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TRANSCRIPT OF RECORD

412909

Sup Ct

Supreme Court of the United States

OCTOBER TERM, 1940

No. 15

FLEISHER ENGINEERING & CONSTRUCTION CO., AND JOSEPH A. BASS, DOING BUSINESS AS JOSEPH A. BASS CO., ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF GEORGE S. HALLENBECK, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 14, 1940.

CERTIORARI GRANTED APRIL 22, 1940.

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INDEX.

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

UNITED STATES OF AMERICA for the use and benefit of George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspection and Testing Laboratory,

Appellee,

vs.

FLEISHER ENGINEERING & CONSTRUCTION CO., JOSEPH A. BASS, doing business as Joseph A. Bass Co., ROYAL INDEMNITY COMPANY and MARYLAND CASUALTY COMPANY, 2

Appellants,

and other defendants named but not served with the summons.

Statement Under Rule XIII.

This action was brought in the United States District Court for the Western District of New York under the so-called Miller Act of August 24, 1935, Chapter 642, sections 1, 2, 3 and 4, 40 USCA, sections 270 A, 270 B, 270 C, and 270 D, to recover for work and labor furnished in work 3 required for construction of the super-structure of Kenfield Housing Project H-6703 in Buffalo, N. Y., under standard form of contract and government payment bond to the United States of America, whereby the appellants, Fleisher Engineering & Construction Co., and Joseph A. Bass, doing business as Joseph A. Bass Co., were principals and the defendants-appellants, Maryland Casualty Company and Royal Indemnity Company and others were sureties.

Statement Under Rule XIII.

4 None of the defendants or other parties to the action have been arrested nor has any property been attached or arrested. No question has at any time been referred to a Commissioner or Commissioners, Master or Referee.

The Complaint of the United States of America for the use and benefit of George S. Hallenbeck was filed in the office of the Clerk of the United States District Court for the Western District of New York on August 24, 1938 and summons was issued thereon on that day. The summons was served on the defendant, Fleisher Engineering & Con-
5 struction Co. on the 13th day of April, 1938 by the United States Marshal for the Western District of New York, and on the defendant, Royal Indemnity Company, on the 11th day of April, 1938, by the United States Marshal for the Southern District of New York. Proof of service on both of said defendants was filed in the clerk's office on the 15th day of April, 1938.

On the 14th day of May, 1938, the defendants, Fleisher Engineering & Construction Co., Joseph A. Bass, doing business as Joseph A. Bass Co., and Maryland Casualty Company voluntarily appeared in the action by Gibbons,
6 Pottle & Pottle, their attorneys, by appearance that day filed.

On September 3, 1938, the defendant, Royal Indemnity Company, appeared by the aforesaid attorneys by a praecipe that day filed. None of the other parties to the action have been served with the summons nor have any of them in any manner appeared. On September 10, 1938, separate answers were filed in the clerk's office on behalf of the defendants, Maryland Casualty Company, Royal Indemnity Company, Fleisher Engineering & Construction Co., and

Statement Under Rule XIII.

Joseph A. Bass, doing business as Joseph A. Bass Co., and 7
copies served upon the attorney for the plaintiff.

On December 10, 1938, the defendants above named filed and served interrogatories under the provisions of Rule 33 of the Rules of Civil Procedure, answers to which were filed in the clerk's office and served on January 28, 1939.

On March 1, 1938 an order was made at the March, 1939 Stated Term of the District Court denying the motion theretofore made by the aforementioned defendants for a summary judgment, which order was entered in the clerk's office on March 3, 1939. A motion was made at the same 8
time in a companion case for the use of J. H. Welch Company. An opinion was written by Hon. John Knight, District Judge, who granted said orders in the Welch case and referred to in his opinion in the case at bar, both of which opinions were filed in the clerk's office on February 27, 1939. On the 1st day of May, 1939, an order was made at the March, 1939, Stated Term of the said court upon motion of the plaintiff, which directed a summary judgment in favor of the plaintiff for the relief demanded in the complaint, which order was entered in the clerk's office on June 9, 1939, on which day the final judgment now appealed from 9
was also entered in said clerk's office. On June 13, 1939 the defendants filed in the clerk's office and served their written assignment of errors, supersedeas bond, and notice of appeal from the said final judgment.

The names in full of all parties to the action who have appeared or have been served with the summons are as above written.

Gibbons, Pottle & Pottle, are attorneys for the defendants, Fleisher Engineering & Construction Co., Joseph A.

Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company and Maryland Casualty Company.

Edwin J. Culligan, Esq., 928 Liberty Bank Bldg., Buffalo, N. Y., is attorney for the plaintiff.

There has been no change in parties plaintiff or defendant since the commencement of the action.

Dated, Buffalo, N. Y., June 23, 1939.

FRANK GIBBONS,
One of the Attorneys for the
Defendants and Appellants,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

Bill of Complaint.

(Name of Court and Title of Action.)

United States of America for the use and benefit of George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspection and Testing Laboratory, bring this their bill of complaint and allege:

FIRST: That the plaintiff is a resident of the County of Erie and State of New York, doing business under the assumed name and style of Hallenbeck Inspection and Testing Laboratory.

SECOND: That the defendant, Fleisher Engineering & Construction Co., is a corporation organized and existing under the laws of the State of Delaware.

THIRD: That the defendant, Joseph A. Bass, doing 13
business as Joseph A. Bass Co., is a resident of the City of Minneapolis, Minn.

FOURTH: That the defendant, Royal Indemnity Company is a domestic corporation with its principal place of business in the City of New York, New York.

FIFTH: That the defendant, Maryland Casualty Company, is a Maryland Corporation with its principal place of business in the City of Baltimore and State of Maryland.

SIXTH: That on or about the 14th day of July, 1936, 14
the United States of America, acting by the Federal Emergency Administrator of Public Works, and the defendants, the Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., entered into a written contract whereby the said defendants, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., agreed to furnish all the labor and materials and perform all work required for the construction of the superstructure for Kenfield Housing Project No. H-6703 in Buffalo, New York, for the consideration of the sum of Three Million nine hundred ninety-nine thousand four hundred dollars 15
($3,999,400.00), which said contract is incorporated herein by reference thereto.

SEVENTH: That pursuant to the Act of Congress approved August 24th, 1935, the defendants, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., as Principal and the defendants, the Maryland Casualty Company and Royal Indemnity Company, *et al*, as sureties, on or about the 14th

16 day of July, 1936, duly executed a standard government form of payment bond to the United States of America, wherein and whereby the said defendant Principal and the defendant, Royal Indemnity Company, as surety, bound themselves, jointly and severally, in the amount of Three hundred fifty-nine thousand nine hundred forty-six dollars ($359,946.00); and, the said defendant principal and the defendant, Maryland Casualty Company, as surety, bound themselves, jointly and severally in the sum of Seventy-nine thousand nine hundred eighty-eight dollars ($79,988.00), conditioned that if the Principal, Fleisher
17 Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety be hereby waived, then this obligation to be void; otherwise to remain in full force and virtue, said bond being incorporated in said complaint more fully by reference thereto.

18 EIGHTH: The said bond was duly accepted by the United States of America, and upon such acceptance, the contract for the construction and completion of the buildings aforementioned was awarded to the defendants, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co. The said Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., as principal, and the said Maryland Casualty Company and the Royal Indemnity Company, as sureties, had imposed upon them,

jointly and severally, the liability, among other things, of 19
seeing that prompt payment was made by said Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., to persons supplying labor and material in the prosecution of the work contemplated by said contract, but notwithstanding the duty imposed upon them, the said principal and the said sureties have broken the condition of the said bond in the manner as hereinafter set forth.

NINTH: That thereafter and during the months of March, April and May of 1937, the use plaintiff at the special instance and request of the Easthom Melvin Co. 20
Inc. performed certain work and labor in the inspection and testing of materials on the aforesaid Kenfield Housing Project, all of which were of the agreed price and reasonable value of Ten hundred Twelve dollars and eighty-seven cents ($1012.87), the terms of payment net cash 2% ten days.

TENTH: Upon information and belief that the said Easthom Melvin Co. Inc. was a subcontractor of the said defendants, Fleisher Engineering and Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co. 21
and that the labor performed by this use plaintiff was required to be performed by the said defendants, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., under its aforesaid contract with the United States of America and was so performed with the knowledge, consent and approval of the defendants, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., for the aforesaid mentioned project.

22 ELEVENTH: The said defendant, Easthom Melvin Co. Inc. failed and neglected to pay to the use plaintiff the said sum of Ten hundred twelve dollars and eighty-seven cents ($1012.87) according to its contract and that within ninety days of the said due date, this use plaintiff duly notified the defendants, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., that the said Easthom Melvin Co. Inc. had failed and neglected to make the payment required and that said notice to the defendants, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A.
23 Bass Co., complied with all the rules and requirements of the statute for the perfecting of a right of action under the aforesaid mentioned bond.

TWELFTH: Upon information and belief that one year has not elapsed from the date of final settlement of the contract and that although due demand has been made upon the defendants, and each of them, no part of the said sum of Ten hundred twelve dollars and eighty-seven cents ($1012.87) with interest, has been paid to the use plaintiff.

THIRTEENTH: That all of said labor was performed
24 within the said Western District of New York.

WHEREFORE, the United States of America for the use and benefit of George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspection and Testing Laboratory, demands judgment against the defendants in the sum of Ten hundred twelve dollars and eighty-seven cents ($1012.87) with interest, from the 1st day of December, 1937, together with such other and

further relief as the court may seem proper and the costs and disbursements of this action.

EDWIN J. CULLIGAN,
Attorney for Plaintiff,
Office & P. O. Address,
928 Liberty Bank Bldg.,
Buffalo, New York.

(Verified.)

Endorsed:

Filed Aug. 24, 1938.

Praecipe for Appearance, Royal Indemnity Co.

(Name of Court and Title of Action.)

The Clerk will please enter our appearance as attorneys for the defendant, Royal Indemnity Company, in the above entitled action.

Dated Buffalo, N. Y., September 3, 1938.

GIBBONS, POTTLE & POTTLE,
Attorneys for defendant Royal Indemnity Company,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

Endorsed:

Filed Sep. 3, 1938.

28 **Praecipe for Appearance for Fleisher Engineering & Construction Co., Joseph A. Bass and Maryland Casualty Co.**

(Name of Court and Title of Action.)

The Clerk will please enter our appearance as attorneys for the defendants, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., and also for the Maryland Casualty Company.

Dated Buffalo, N. Y., May 13, 1938.

29

GIBBONS, POTTLE & POTTLE,
Attorneys for defendants Fleisher Engineering & Construction Co., Joseph A. Bass, doing business as Joseph A. Bass Co., and Maryland Casualty Company,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

Endorsed:
Filed May 14, 1938.

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30 **Answer of Defendant, Maryland Casualty Company.**

(Name of Court and Title of Action.)

The defendant, Maryland Casualty Company, by Gibbons, Pottle & Pottle, its attorneys, answers the complaint in this action as follows:

FIRST DEFENSE

1. The defendant, Maryland Casualty Company, admits the allegations stated in the paragraphs of the said com-

plaint numbered respectively Second, Third, Fourth, Fifth and Sixth. 31

2. As to the matters alleged in that part or paragraph of the said complaint numbered First this defendant, Maryland Casualty Company, denies that the plaintiff is a resident of the County of Erie or State of New York, or doing business under the assumed name or style of Hallenbeck Inspection and Testing Laboratory.

3. As to the allegations contained in that part or paragraph of the said complaint numbered Seventh this defendant, Maryland Casualty Company, admits the execution of 32
a bond of the general character described in said paragraph and that it contained the conditions therein alleged, excepting only that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that the said bond was a standard government form of payment bond, and that it is without knowledge or information sufficient to form a belief as to the terms or conditions of the bond therein referred to as being intended to be incorporated in the complaint by reference if the terms or conditions thereof are other or different from the terms and conditions therein before alleged to have been 33
contained in such bond.

4. As to the allegations contained in that part or paragraph of the said complaint numbered Eighth, this defendant, Maryland Casualty Company, upon information and belief, denies that either it or the Royal Indemnity Company as sureties or otherwise, either jointly or severally, or otherwise, had imposed upon them any liability to see that prompt payment was made by the said Fleisher En-

34 gineering & Construction Company and Joseph A. Bass, or either of them, to any person or persons supplying either labor or material in the prosecution of the work therein described, and it also denies upon information and belief that either it, or any other obligor, under the said bond has broken any condition thereof. Except as herein denied this defendant admits the truth of each and every other allegation contained in the said Eighth paragraph of the said complaint.

5. This defendant, Maryland Casualty Company, alleges that it is without knowledge or information sufficient to
35 form a belief as to the truth of each and every averment contained in those parts or paragraphs of the said complaint numbered respectively Ninth, Tenth, Eleventh and Thirteenth, and as to the aforesaid Ninth paragraph of the said complaint, this defendant, upon information and belief denies that any of the work or labor which the use plaintiff alleges therein that he performed, was labor or material supplied in the prosecution of the work provided for in the contract in the said complaint referred to, or any modification of the said contract at any time made, and as to the aforesaid Eleventh paragraph of the said com-
36 plaint this defendant includes as a part of this paragraph as if written herein the Third defense hereinafter set forth.

6. As to the matters alleged in that part or paragraph of the said complaint numbered Twelfth, this defendant, Maryland Casualty Company, denies that any demand has been made upon it within the requirements of the bond in such case made and provided for the payment of the $1012.87, or any part thereof.

SECOND DEFENSE

37

1. The complaint fails to state a claim against this defendant, Maryland Casualty Company, upon which relief can be granted.

THIRD DEFENSE

1. That the use plaintiff, George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspection and Testing Laboratory, had no direct contractual relationship, express or implied, with either Fleisher Engineering & Construction Company, or Joseph A. Bass, doing business as Joseph A. Bass Co., who are 38
the contractors who furnished the payment bond intended to be referred to in the said complaint, and that more than ninety days have elapsed from the date on which the use plaintiff, George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspection & Testing Laboratory, alleges that it did or performed the last of the labor or furnished or supplied the last of the material for which the claim set forth in the complaint is made, and that no written notice stating with substantial accuracy the amount claimed, or the name of the party to whom the material was furnished or supplied, or 39
for whom the labor was done or performed, has been served either by mailing it by registered mail, postage prepaid in an envelope addressed to such contractors, or either of them, at any place in which they, or either of them, maintained an office or conducted his or its business, or his or its residence, or elsewhere, nor has any such notice been served in any manner in which the United States Marshal of the Western District of New York, is authorized by law to serve

40 a summons, for which reasons the use plaintiff has no claim or demand against this defendant.

GIBBONS, POTTLE & POTTLE,
Attorneys for defendant Maryland
Casualty Company,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

Frank Gibbons,
One of the Attorneys for the defendant
Maryland Casualty Company,
41 618-630 Walbridge Bldg.,
Buffalo, N. Y.

Verified.

Endorsed:

Filed, Sep. 10, 1938.

Answer of Defendant, Royal Indemnity Company.

(Name of Court and Title of Action.)

42 The defendant, Royal Indemnity Company, by Gibbons, Pottle & Pottle, its attorneys, answers the complaint in this action as follows:

FIRST DEFENSE.

1. The defendant, Royal Indemnity Company, admits the allegations stated in the paragraphs of the said complaint numbered respectively Second, Third, Fourth, Fifth and Sixth.

2. As to the matters alleged in that part or paragraph of the said complaint numbered First this defendant, Royal

Indemnity Company, denies that the plaintiff is a resident of the County of Erie or State of New York, or doing business under the assumed name or style of Hallenbeck Inspection and Testing Laboratory. 43

3. As to the allegations contained in that part or paragraph of the said complaint numbered Seventh this defendant, Royal Indemnity Company, admits the execution of a bond of the general character described in said paragraph and that it contained the conditions therein alleged, excepting only that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that the said bond was a standard government form of payment bond, and that it is without knowledge or information sufficient to form a belief as to the terms or conditions of the bond therein referred to as being intended to be incorporated in the complaint by reference if the terms or conditions thereof are other or different from the terms and conditions therein before alleged to have been contained in such bond. 44

4. As to the allegations contained in that part or paragraph of the said complaint numbered Eighth, this defendant, Royal Indemnity Company, upon information and belief, denies that either it or the Maryland Casualty Company as sureties or otherwise, either jointly or severally, or otherwise, had imposed upon them any liability to see that prompt payment was made by the said Fleisher Engineering & Construction Company and Joseph A. Bass, or either of them, to any person or persons supplying either labor or material in the prosecution of the work therein described, and it also denies upon information and belief that either it, or any other obligor, under the said bond has 45

broken any condition thereof. Except as herein denied this defendant admits the truth of each and every other allegation contained in the said Eighth paragraph of the said complaint.

5. This defendant, Royal Indemnity Company, alleges that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment contained in those parts or paragraphs of the said complaint numbered respectively Ninth, Tenth, Eleventh and Thirteenth, and as to the aforesaid Ninth paragraph of the said complaint, this defendant, upon information and belief denies that any of the work or labor which the use plaintiff alleges therein that he performed, was labor or material supplied in the prosecution of the work provided for in the contract in the said complaint referred to, or any modification of the said contract at any time made, and as to the aforesaid Eleventh paragraph of the said complaint, this defendant includes as a part of this paragraph as if written herein the Third Defense hereinafter set forth.

6. As to the matters alleged in that paragraph or part of the said complaint numbered Twelfth, this defendant, Royal Indemnity Company, denies that any demand has been made upon it within the requirements of the bond in such case made and provided for the payment of the $1012.-87, or any part thereof.

SECOND DEFENSE.

1. The complaint fails to state a claim against this defendant, Royal Indemnity Company, upon which relief can be granted.

Answer of Defendant, Royal Indemnity Company.

THIRD DEFENSE.

1. That the use plaintiff, George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspection and Testing Laboratory, had no direct contractual relationship, express or implied, with either Fleisher Engineering & Construction Company, or Joseph A. Bass, doing business as Joseph A. Bass Co., who are the contractors who furnished the payment bond intended to be referred to in the said complaint, and that more than ninety days have elapsed from the date on which the use plaintiff, George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspection & Testing Laboratory, alleges that it did or performed the last of the labor or furnished or supplied the last of the material for which the claim set forth in the complaint is made, and that no written notice stating with substantial accuracy the amount claimed, or the name of the party to whom the material was furnished or supplied, or for whom the labor was done or performed, has been served either by mailing it by registered mail, postage prepaid, in an envelope addressed to such contractors, or either of them, at any place in which they, or either of them, maintained an office or conducted his or its business, or his or its residence, or elsewhere, nor has any such notice been served in any manner in which the United States Marshal of the Western District of New York, is authorized by law to serve a summons, for which reasons the use plaintiff has no claim or demand against this defendant.

GIBBONS, POTTLE & POTTLE,
Attorneys for Defendant Royal
Indemnity Company,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

52

Frank Gibbons,
One of the Attorneys for the Defendant
Royal Indemnity Company,
618-630 Walbridge Bldg.,
Buffalo, N. Y.
Verified.

Endorsed:

Filed Sept. 10, 1938.

53

Answer of Defendant, Fleisher Engineering & Construction Company.

(Name of Court and Title of Action.)

The defendant, Fleisher Engineering & Construction Co. by Gibbons, Pottle & Pottle, its attorneys, answers the complaint in this action as follows:

FIRST DEFENSE.

1. The defendant, Fleisher Engineering & Construction Co., admits the allegations stated in the paragraphs of the
54 said complaint numbered respectively Second, Third, Fourth, Fifth and Sixth.

2. As to the matters alleged in that part or paragraph of the said complaint numbered First, this defendant, Fleisher Engineering & Construction Company, denies that the plaintiff is a resident of the County of Erie or State of New York, or doing business under the assumed name or style of Hallenbeck Inspection and Testing Laboratory.

Answer of Defendant, Fleisher Engineering & Construction Company.

3. As to the allegations contained in that part or paragraph of the said complaint numbered Seventh, this defendant, Fleisher Engineering & Construction Company, admits the execution of a bond of the general character described in said paragraph and that it contained the same conditions therein alleged, excepting only that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that the said bond was a standard government form of payment bond, and that it is without knowledge or information sufficient to form a belief as to the terms or conditions of the bond therein referred to as being intended to be incorporated in the complaint by reference if the terms or conditions thereof are other or different from the terms and conditions therein before alleged to have been contained in said bond. 55 56

4. As to the allegations contained in that part or paragraph of the said complaint numbered Eighth, this defendant, Fleisher Engineering & Construction Co., upon information and belief, denies that either the Maryland Casualty Company or the Royal Indemnity Company, or both, as sureties, or otherwise, either jointly or severally, or otherwise, had imposed upon them any liability to see that prompt payment was made by this defendant, or Joseph A. Bass, doing business as Joseph A. Bass Co., or either or both of them, to any person or persons supplying either labor or material in the prosecution of the work therein described. It also denies upon information and belief that either it or any other obligor under said bond has broken any condition thereof. Except as herein denied this defendant admits the truth of each and every other allega- 57

58 tion contained in the said Eighth paragraph of the said complaint.

5. This defendant, Fleisher Engineering & Construction Co. alleges that it is without knowledge or information sufficient to form a belief as to the truth of each and every averment contained in those parts or paragraphs of the said complaint numbered respectively Ninth, Tenth, Eleventh, and Thirteenth, and as to the aforesaid Ninth paragraph of the said complaint, this defendant, upon information and belief denies that any of the work or labor which the use
59 plaintiff alleges therein that he performed, was labor or material supplied in the prosecution of the work provided for in the contract in the said complaint referred to, or any modification of the said contract at any time made, and as to the aforesaid Eleventh paragraph of the said complaint, this defendant includes as a part of this paragraph as if written herein the Third Defense hereinafter set forth.

6. As to the matters alleged in that part or paragraph of the said complaint numbered Twelfth, this defendant, Fleisher Engineering & Construction Co., denies that any
60 demand has been made upon it within the requirements of the bond in such case made and provided for the payment of the sum of $1012.87, or any part thereof.

SECOND DEFENSE.

1. The complaint fails to state a claim against this defendant, Fleisher Engineering & Construction Co., upon which relief can be granted.

Answer of Defendant, Fleisher Engineering & Construction Company.

THIRD DEFENSE. 61

1. That the use plaintiff, George S. Hallenbeck, doing business as Hallenbeck Inspection and Testing Laboratory, had no direct contractual relationship, express or implied, with either Fleisher Engineering & Construction Co. or Joseph A. Bass, doing business as Joseph A. Bass Co., who are the contractors who furnished the payment bond intended to be referred to in the said complaint, and that more than ninety days have elapsed from the date on which the use plaintiff, George S. Hallenbeck, doing business under the assumed name of Hallenbeck Inspection and Testing 62
Laboratory, alleges that it did or performed the last of the labor or furnished or supplied the last of the material for which the claim set forth in the complaint is made, and that no written notice stating with substantial accuracy the amount claimed, or the name of the party to whom the material was furnished or supplied, or for whom the labor was done or performed, has been served either by mailing it by registered mail, postage prepaid, in an envelope addressed to such contractors, or either of them, at any place in which they, or either of them, maintained an office or conducted his or its business, or his or its residence, or elsewhere, nor has 63
any such notice been served in any manner in which the United States Marshal of the Western District of New York is authorized by law to serve a summons, for which reasons the use plaintiff has no claim or demand against this defendant.

GIBBONS, POTTLE & POTTLE,
Attorneys for Defendant Fleisher
Engineering & Construction Co.,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

64 Frank Gibbons,
One of the Attorneys for the Defendant
Fleisher Engineering & Construction Co.,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

Verified.

Endorsed:

Filed Sept. 10, 1938.

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65 **Answer of Defendant, Bass.**

(Name of Court and Title of Action.)

The defendant, Joseph A. Bass, doing business as Joseph A. Bass Co., by Gibbons, Pottle & Pottle, its attorneys, answers the complaint in this action as follows:

FIRST DEFENSE.

1. The defendant, Joseph A. Bass, admits the allegations stated in the paragraphs of the said complaint numbered respectively Second, Third, Fourth, Fifth and Sixth.

66 2. As to the matters alleged in that part or paragraph of the said complaint numbered First this defendant, Joseph A. Bass, denies that the plaintiff is a resident of the County of Erie or State of New York, or doing business under the assumed name or style of Hallenbeck Inspection and Testing Laboratory.

3. As to the allegations contained in that part or paragraph of the said complaint numbered Seventh, this defendant, Joseph A. Bass, admits the execution of a bond of the general character described in said paragraph and that

it contained the same conditions therein alleged, excepting only that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that the said bond was a standard government form of payment bond, and that he is without knowledge or information sufficient to form a belief as to the terms or conditions of the bond therein referred to as being intended to be incorporated in the complaint by reference if the terms or conditions thereof are other or different from the terms and conditions therein before alleged to have been contained in such bond. 67

4. As to the allegations contained in that part or paragraph of the said complaint numbered Eighth, this defendant, Joseph A. Bass, upon information and belief, denies that either the Maryland Casualty Company or the Royal Indemnity Company, or both, as sureties or otherwise, either jointly or severally, or otherwise, had imposed upon them any liability to see that prompt payment was made by this defendant, or the Fleisher Engineering & Construction Co., or either or both of them, to any person or persons supplying either labor or material in the prosecution of the work therein described. He also denies upon information and belief that either he or any other obligor under said bond has broken any condition thereof. Except as herein denied this defendant admits the truth of each and every other allegation contained in the said Eighth paragraph of the said complaint. 68 69

5. This defendant, Joseph A. Bass, alleges that he is without knowledge or information sufficient to form a belief as to the truth of each and every averment contained in those parts or paragraphs of the said complaint numbered respectively Ninth, Tenth, Eleventh and Thirteen,

70 and as to the aforesaid Ninth paragraph of the said complaint, this defendant, upon information and belief denies that any of the work or labor which the use plaintiff alleges therein that he performed, was labor or material supplied in the prosecution of the work provided for in the contract in the said complaint referred to, or any modification of the said contract at any time made, and as to the aforesaid Eleventh paragraph of the said complaint, this defendant includes as a part of this paragraph as if written herein the Third Defense hereinafter set forth.

6. As to the matters alleged in that part or paragraph
71 of the said complaint numbered Twelfth, this defendant, Joseph A. Bass, denies that any demand has been made upon him within the requirements of the bond in such case made and provided for the payment of the sum of $1012.87, or any part thereof.

SECOND DEFENSE.

1. The complaint fails to state a claim against this defendant, Joseph A. Bass, upon which relief can be granted.

THIRD DEFENSE.

72 1. That the use plaintiff, George S. Hallenbeck, doing business as Hallenbeck Inspection and Testing Laboratory, had no direct contractual relationship, express or implied, with either Fleisher Engineering & Construction Co. or Joseph A. Bass, doing business as Joseph A. Bass Co., who are the contractors who furnished the payment bond intended to be referred to in the said complaint, and that more than ninety days have elapsed from the date on which the use plaintiff, George S. Hallenbeck, doing business under the assumed name of Hallenbeck Inspection and Test-

ing Laboratory, alleges that it did or performed the last of the labor or furnished or supplied the last of the material for which the claim set forth in the complaint is made, and that no written notice stating with substantial accuracy the amount claimed, or the name of the party to whom the material was furnished or supplied, or for whom the labor was done or performed, has been served either by mailing it by registered mail, postage prepaid, in an envelope addressed to such contractors, or either of them, at any place in which they, or either of them, maintained an office or conducted his or its business, or his or its residence, or elsewhere, nor has any such notice been served in any manner in which the United States Marshal of the Western District of New York is authorized by law to serve a summons, for which reasons the use plaintiff has no claim or demand against this defendant. 73 74

GIBBONS, POTTLE & POTTLE,
Attorneys for Defendant, Joseph A. Bass,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

Frank Gibbons,
One of the Attorneys for the
Defendant, Joseph A. Bass,
618-630 Walbridge Bldg.,
Buffalo, N. Y. 75

(Verified.)

Endorsed:

Filed, Sept. 10, 1938.

Interrogatories Under Rule 33 of Rules of Civil Procedure.

76

(Name of Court and Title of Action.)

Sir:

YOU WILL PLEASE TAKE NOTICE that the defendants, Royal Indemnity Company and Maryland Casualty Company, Fleisher Engineering & Construction Co. and Joseph A. Bass, pursuant to the provisions of Rule 33 of the Rules of Civil Procedure, demand that the following written interrogatories be answered by the use plaintiff, George S. Hallenbeck, to wit:

77 1. On what date did the plaintiff notify the defendant, Fleisher Engineering & Construction Company that Easthom Melvin Co. Inc. had failed and neglected to pay to the use plaintiff the sum of $1012.87 referred to in the paragraph of the plaintiff's complaint herein numbered Eleventh.

2. On what date did the plaintiff notify the defendant, Joseph A. Bass, that Easthom Melvin Co. Inc. had failed and neglected to pay to the use plaintiff the sum of $1012.87 referred to in the paragraph of the plaintiff's complaint herein numbered Eleventh.

78

3. Was the notice which may be specified in the answer to the foregoing interrogatory No. 1 oral or in writing?

4. Was the notice which may be specified in the answer to the foregoing interrogatory No. 2 oral or in writing?

5. If in answer to the foregoing interrogatory No. 3, it shall be stated that oral notice was given, then state the name and address of the individual who gave the notice for or on behalf of the plaintiff, and the name and address

of the individual to whom the notice was given on behalf of the defendant, Fleisher Engineering & Construction Co., and then state in substance what was said. 79

6. If in answer to the foregoing interrogatory No. 4 it shall be stated that oral notice was given, then state the name and address of the individual who gave the notice for or on behalf of the plaintiff, and the name and address of the individual to whom the notice was given on behalf of the defendant, Joseph A. Bass, and then state in substance what was said.

7. If in answer to the foregoing interrogatory No. 3 it shall be stated that the notice was in writing, then set forth in full a true and correct copy of the said written notice and specify the date on which it was received, and how it was received, that is whether it was delivered to the said defendant, Fleisher Engineering & Construction Co. personally or by mail; if personally state the time and place of delivery, the name of the person by whom it was delivered, the name and address of the person to whom it was delivered; if by mail set forth a statement which shall show when and where the same was deposited in the post-office, to whom and at what address the same was mailed, and whether the same was sent by ordinary mail or by registered mail. 80 81

8. If in answer to the foregoing interrogatory No. 4 it shall be stated that the notice was in writing, then set forth in full a true and correct copy of the said written notice and specify the date on which it was received, and how it was received, that is whether it was delivered to the said defendant, Joseph A. Bass, personally or by mail; if personally

82 state the time and place of delivery, the name of the person by whom it was delivered, the name and address of the person to whom it was delivered; if by mail set forth a statement which shall show when and where the same was deposited in the postoffice, to whom and at what address the same was mailed and whether the same was sent by ordinary mail or by registered mail.

9. Have you any registry receipts from the United States Postoffice showing the delivery of any written documents, letter, or other communication which may have been referred to you in your answers to any of the preceding in-
83 terrogatories? If your answer be in the affirmative please attach the same to your deposition and state that you have done so, or set forth a true and correct copy thereof.

Dated Buffalo, N. Y., December 8th, 1938.

Yours, etc.,

GIBBONS, POTTLE & POTTLE,
Attorneys for the defendants Fleisher
Engineering & Construction Co. *et al.*,
84 618-630 Walbridge Bldg.,
Buffalo, N. Y.

To:
Edwin J. Culligan, Esq.,
Attorney for Plaintiff.

Endorsed:

Filed Dec. 10, 1938.

Answers to Interrogatories.

(Name of Court and Title of Action.) 85

The above named plaintiff, for its written interrogatories, pursuant to defendants' demand, hereby answers same in the following manner:

1. Plaintiff notified the defendant, Fleisher Engineering & Construction Co. on June 3, 1937.

2. Plaintiff did not send a separate notice to Joseph A. Bass, but alleges that the above notice to Fleisher Engineering & Construction Co. was also notice to Joseph A. Bass.

3. That notice was in writing. 86

4. Same notice.

7. A copy of the notice is attached hereto. It was delivered by mail and, to best of plaintiff's information and belief, same was received at the office of Fleisher Engineering & Construction Co., 233 Langfield Drive, Buffalo, N. Y., either on June 3, 1937, or June 4, 1937. It was sent by ordinary mail and was deposited in a United States Post Office box in the vicinity of 56 Pearl St., Buffalo, N. Y., on June 3, 1937, addressed to the said Langfield Drive address.

8. It is claimed that the same notice operated as notice 87 to Joseph A. Bass.

9. No.

EDWIN J. CULLIGAN,
Attorney for Plaintiff,
Office & P. O. Address,
928 Liberty Bank Bldg.,
Buffalo, N. Y.

88 To:

Gibbons, Pottle & Pottle,
Attorneys for the defendants Fleisher Engineering & Construction Co., *et al.*,
Office & P. O. Address,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

Verified.

Endorsed:

Filed Jan. 28, 1939.

89

COPY

Docket H-6703 (ERA) NY (S)
June 3rd, 1937 860.1

Re:—Kenfield Housing Project
Payment of Accounts
Easthom-Melvin, Sub-Contractor

C. Leslie Weir, Project Engineer,
Langfield Drive,
Buffalo, N. Y.

90 Dear Sir:

We list below invoices of March, April and May covering inspection and testing work on the Kenfield Housing Project, for which we are unable to secure payment.

March—Invoice #310	$ 541.65
April —Invoice #407	442.37
May —Invoice #509	28.85
	$1012.87

Defendants' Notice of Motion for Summary Judgment.

The Easthom-Melvin Co., have referred us to the Maryland Casualty Co., for payment of these accounts. 91

Our contract agreement with Easthom-Melvin gives the usual trade discount of 2%—10 days or 30 days net.

The Maryland Casualty Co., local office advises that they have taken the matter of payment up with the home office but to date have been unable to get instructions to pay.

As these invoices chiefly cover labor, payment should be made promptly. We would appreciate any assistance you may be able to give to the end that we will be paid promptly for this work. 92

Very truly yours,

HALLENBECK INSPECTION & TESTING LABORATORY
GEO. S. HALLENBECK,
President

GSH:LW
CC: Fleisher Engr. & Constr. Co.

Defendants' Notice of Motion for Summary Judgment. 93

(Name of Court and Title of Action.)

SIR:

YOU WILL PLEASE TAKE NOTICE that upon the summons and complaint in this action and the separate answers of the defendants, Royal Indemnity Company, Maryland Casualty Company, Fleisher Engineering & Construction Company, and Joseph A. Bass, and upon the interroga-

94 tories on behalf of the said defendants, which were served upon you on the 9th day of December, 1938, and upon the answers to such interrogatories served upon the attorneys for the said defendants on January 28, 1939, a motion will be made at a Stated Term of the United States District Court, for the Western District of New York, appointed to be held at the United States Court House, Niagara Square, Buffalo, N. Y., on the 14th day of February, 1939, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for a summary judgment in favor of the defendants and against the plaintiff, which shall dis-
95 miss the complaint in this action, and award the defendants, and each of them, a judgment of no cause of action by reason of the facts that the pleadings, interrogatories and answers thereto show that there is no genuine issue as to any material fact and that the said defendants are entitled to a judgment as above stated as a matter of law, and also for such other and further or different relief in the premises as to the court may seem just and equitable.

Dated Buffalo, N. Y., January 30th, 1939.

Yours, etc.,

96

FRANK GIBBONS,
One of the Attorneys for the Defendants,
618-630 Waibridge Bldg.,
Buffalo, N. Y.

To

Edwin J. Culligan, Esq.,
Attorney for the Plaintiff.

Endorsed:

Filed Feby. 2, 1939.

Order Denying Defendants' Motion for Summary Judgment, Captioned at March, 1939, Stated Term, March 1, 1939.

97

(Name of Court and Title of Action.)

Motion on behalf of the defendants, Royal Indemnity Company, Maryland Casualty Company, Fleisher Engineering & Construction Co. and Joseph A. Bass, pursuant to Rule 56 of the Rules of Civil Procedure, for a summary judgment in favor of the defendants and against the plaintiff.

Appearances: Frank Gibbons, Esq., of counsel for the moving parties on behalf of the motion.

98

Edwin J. Culligan, Esq., counsel for the plaintiff, in opposition to motion.

Papers read and filed by moving parties in support of motion: Complaint in the action, separate answers of the defendants, Fleisher Engineering & Construction Company, Joseph A. Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company, and Maryland Casualty Company, interrogatories and the answers thereto.

The motion having come on to be heard on the 14th day of February, 1939, and due deliberation having been had thereon,

99

NOW, upon motion of Edwin J. Culligan, Esq., attorney for the plaintiff, it is

ORDERED that said motion for summary judgment be and the same is hereby denied.

JOHN KNIGHT,
U. S. District Judge.

Endorsed:

Filed March 3, 1939.

Opinion of Knight, D. J., in This Action.

(Name of Court and Title of Action.)

100 KNIGHT, District Judge:

This is a motion for summary judgment in a suit brought under the provisions of section 270 (a), (b), and (c) of USCA. The questions presented in U. S. for the use of J. H. Welch Co., Inc. v. Fleisher Engineering & Construction Co., Inc., decided herewith, are raised. What was said in that case with reference to the service of notice by registered mail is applicable here. Service was there, as it is here held to be sufficient.

101 On the question of the claim a slightly different question is involved. The so-called notice is directed to the Project Engineer, but service of a copy of the notice was made upon the Fleisher Engineering & Construction Company. The particulars of the claim are sufficient to meet the requirements of the statute, and it is thought that the effect is the same as though the claim were directed to Fleisher Engineering & Construction Company. The latter company, the contractor, was fully informed of the alleged liability.

The motion is denied.

February 27, 1939.

102 JOHN KNIGHT,
United States District Judge.

Endorsed:

Filed Feb. 27, 1939.

Opinion of Knight, D. J., Rendered in Action Entitled:

UNITED STATES OF AMERICA for the use and benefit of J. H. WELCH COMPANY, INC., *Plaintiff*, v. FLEISHER ENGINEERING & CONSTRUCTION CO., *et al.*, *Defendants.* } Law 2193 A.

103

(Name of Court and Title of Action.)

KNIGHT, District Judge:

104

The defendants, Fleisher Engineering & Construction Company and Joseph A. Bass, were contractors for the construction of a government structure known as Kenfield Housing Project No. H-6703, at Buffalo, N. Y. Easthom-Melvin Company, Inc. were sub-contractors on such structure, and the J. H. Welch Company, Inc., with the consent of the defendants, Fleisher and Bass, furnished certain work, labor and materials to Easthom-Melvin Company, Inc. Easthom-Melvin Company, Inc. failed to pay for these, and this suit is brought under the provisions of the so-called Miller Act, Chapter 642, Laws 1935, Title 40 USCA section 270 a, b, c, and d. Defendants, Royal Indemnity Company, Maryland Casualty Company, Fleisher Engineering & Construction Company, and Joseph A. Bass, move for a summary judgment dismissing the complaint upon the ground that there is no issue as to any material fact presented.

105

Defendants contend that the notice of claim was not served as required by the said Act and that the claim is insufficiently described in said notice. The statute, section

106 270 b (a), provides that the notice precedent to the right to sue shall be served either by mailing by registered mail or as the United States Marshal is authorized to serve summons. The complaint alleges service of notice and the interrogatories show service was made by unregistered mail. The notice itself consists of a letter directed to Fleisher Engineering & Construction Company under the subject noted "Easthom-Melvin Co., Kenfield Housing Project" and referred to an invoice enclosed therewith. This invoice shows the amount claimed, materials furnished and persons to whom furnished. The statute provides that no-
107 tice shall show "with substantial accuracy the amount claimed, name of the party to whom the material was furnished or supplied or for whom the labor was done or performed."

Sections 270 a, b, c, and d, *supra,* replace old section 270, known as the Hurd Act.

The old statute contained no provision for the service of any notice of claim on the contractor prior to suit. What has been said by the courts in regard to it, however, is to be considered in construing the present Act. "The strict
108 letter of an act must, however, yield to its evident spirit and purpose, when this is necessary to give effect to the intent of Congress. * * * The purpose of the Materialmen's Act, which is highly remedial and must be construed liberally, is to provide security for the payment of all persons who supply labor or material in a public work, * * *." Fleischmann Co. v. United States, 270 U. S. 349. "Decisions of this court have made it clear that the statute and bonds given under it must be construed liberally, in order to effectuate the purpose of Congress as declared in the

act. * * * Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this statute." (Citing numerous cases.) Illinois Surety Co. v. John Davis Co., 244 U. S. 376. "The act is intended to be high remedial. Its purpose is simple and beneficial. It is to give a remedy to material men and laborers on the bond of the original contractor and a reasonable time to enforce it, and in a single proceeding to unite all claimants." A. Bryant v. N. Y. Steam Fitting Co., 235 U. S. 327, p. 337. This case is especially in point. It involved the construction of the provision in Section 270, *supra,* which states that the creditor instituting suit shall give personal notice of its pendency and also notice by publication, the last publication to be at least three months before the expiration of the time in which to bring suit. The court there held that publication which expired 23 days prior to the suit limitation period was sufficient; that this provision was directory and that the right to institute suit was not affected. 109 110

"Statutes are not to be so literally construed as to defeat the purpose of the legislature." Hill v. American Surety Co., 200 U. S. 197; see also United States v. Freeman, 44 U. S. 556. "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion." Lau Ow Bew v. United States, 144 U. S. 47. "The statute in question and the proceedings under it are such as to offer great opportunity for such objections, which, if favorably regarded, might often be invoked to defeat substantial justice. In order to prevent this, the Supreme Court has recognized the necessity of a broad and liberal construction 111

112 of the Act * * *." U. S. for use of McNulty Bros. v. Noel Const. Co., *et al.*, 1 F. (2d) 446. United States v. James Mills & Sons Co., 55 F. (2d) 249, like A. Bryant v. N. Y. Steam Fitting Co., *supra*, held that the failure to publish the notice did not defeat the right to sue.

Construing this statute, 270 b (a) in the spirit approved by the Supreme Court, it seems to me it must be held that the service by unregistered mail was sufficient. It is presumed that the contractor received the notice. He had the same opportunity to notify the surety as he otherwise would have had. The surety was not prejudiced. The evident
113 purpose of requiring registration was to insure delivery.

It is not seen that any of the cases cited by the defendants is determinative of the issues. In United States v. Boomer, 183 F. 726, it was held that the limitation period was not extended by virtue of a state statute. Merchants National Bank v. United States, 214 F. 200, seems to have been reversed by A. Bryant v. N. Y. Steam Fitting Co., *supra*. Belnap Hardware & Mfg. Co. v. Ohio Public C. Co., 264 F. 676, held that a creditor may not sue until after the expiration of the period fixed for suit by the United States.
114 In Antrim v. Hannon, 18 F. (2d) 548, it was held that the final settlement or determination commences the tolling of the statute. Illinois Surety Co. v. John Davis Co., 244 U. S. 376, hereinbefore cited, seems opposed to the view expressed on behalf of the defendant. Generally these cases relate to the period of limitation fixed by law.

Attention is called to the case of Breedlove v. General Baking Co., 138 Kan. 143 (1933) and to certain language of the opinion seemingly directly in point. It was said: "The fact that the statute prescribes the delivery of the

written claim by registered mail * * * might very properly and fairly come under the very general rule that it was the intention of the legislature to exclude all other ways of doing it by mail. * * * The legislature in using these terms certainly meant something more formal than what might happen to come to an employer by mail and, therefore, with an apparently good reason for making a distinction limited such service so far as being done by mail to registered mail." In that case, however, no proof was made as to the address of the employer on the envelop enclosing the notice. The court held that such proof was necessary to give rise to the presumption of delivery and held for defendant employer, because plaintiff's case was based on presumption of delivery, rather than upon service or admission. But the court noted the citation of three Kansas cases arising under the same statute; Weaver v. Shanklin Walnut Co., 131 Kan. 771; Eckl v. Sinclair Refining Co., 133 Kan. 285; and Honn v. Elliott *et al.*, 132 Kan. 454, in each of which it was held that service other than by registered mail was sufficient. These cases indicate that where actual receipt of the notice was proved or admitted, delivery by nonregistered mail was sufficient service of the notice despite the limitation of the statute. In the instant case it is to be presumed for the purposes of this motion that the contractor actually received the notice. 115 116 117

A question has been raised as to the sufficiency of the service upon the Fleisher Engineering & Construction Company alone and not upon Joseph A. Bass. As these were joint contractors, service upon either was sufficient. As to the sufficiency of the claim, it is to be said that the same meets fully every requirement of the statute.

118 The motion for summary judgment is denied.
February 27, 1939.

JOHN KNIGHT,
United States District Judge.

Endorsed:

Filed Feb. 27, 1939.

Plaintiff's Notice of Motion for Summary Judgment.

(Name of Court and Title of Action.)

119 Sirs:

YOU WILL PLEASE TAKE NOTICE that upon the summons and complaint in this action and the separate answers of the defendant, Royal Indemnity Company, Maryland Casualty Company, Fleisher Engineering & Construction Company, and Joseph A. Bass, and upon the interrogatories and the replies thereto served in this action and filed in the office of the clerk of this Court, and upon the Order duly granted by this Court on March 1, 1939, denying the motion for summary judgment made on behalf of the defendants, and upon all the proceedings had thereon,
120 and upon the affidavit of George S. Hallenbeck, verified the 17th day of April, 1939, a motion will be made at a Stated Term of the United States District Court for the Western District of New York, to be held in the United States Court House, Niagara Square, Buffalo, N. Y., on the 1st day of May, 1939, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for a summary judgment in favor of the plaintiff and against the defendants, which shall strike out the Answers interposed by the defendants in this action and award to the plaintiff the relief demanded in the complaint against the defendants,

Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company and Maryland Casualty Company, together with such other or further relief, or such other Order, as to the Court may seem proper. 121

Dated: April 14th, 1939.

Yours, etc.,

EDWIN J. CULLIGAN,
Attorney for Plaintiff,
Office & P. O. Address,
928 Liberty Bank Bldg., 122
Buffalo, N. Y.

To:

Gibbons, Pottle & Pottle,
Attorneys for Defendants,
Office & P. O. Address,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

Endorsed:

Filed April 20, 1939.

123

Affidavit of George S. Hallenbeck on Motion.

(Name of Court and Title of Action and Venue.)

GEORGE S. HALLENBECK, being duly sworn, deposes and says that he now is, and was at all the times hereinafter mentioned, doing business under the assumed name and style of Hallenbeck Inspection and Testing Laboratory, with offices at 56 Pearl St. in the City of Buffalo, County of Erie and State of New York.

Affidavit of George S. Hallenbeck on Motion.

124 That this action is brought to recover the sum of One thousand twelve dollars and eighty-seven cents ($1012.87) with interest from the 1st day of December, 1937, by reason of the fact that during the months of March, April and May, 1937, he performed certain work and labor in the inspection and testing of materials on the Kenfield Housing Project under an agreement with the Easthom Melvin Co., Inc.; that he was to be paid the sum of $1012.87 for such services, the terms of payment—net cash, 2% 10th *proximo*.

125 That the said labor performed and the agreed price and reasonable value of said labor, and the time of performance, is more fully set out on the copies of the invoices attached hereto and made a part of this affidavit.

That the said Easthom Melvin Co., Inc. were subcontractors of the defendants, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., and the labor performed by George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspection and Testing Laboratory, was part of the labor required to be performed by the Fleisher En-
126 gineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., under their contract with the United States Government for the construction of the superstructure for Kenfield Housing Project, No. H-6703, in Buffalo, N. Y.

Your deponent has in his possession a certified copy of the contract between the United States of America and the Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., which he will present to the Court upon the hearing of the motion to which this affidavit is directed.

Affidavit of George S. Hallenbeck on Motion.

Your deponent has, also, in his possession, a certified copy of a bond issued by the Royal Indemnity Company in which bond the said Royal Indemnity Company, as surety, and the Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., as principal, bound themselves, jointly and severally, in the amount of $359,946.00 and the said contractors, as principal, and the defendant, Maryland Casualty Company, as surety, bound themselves, jointly and severally, in the amount of $79,988.00, conditioned, among other things, as follows: 127

> "If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue." 128

That your deponent will beg leave to submit said certified copy of the bond to the Court upon the hearing of the motion to which this affidavit is directed.

That on or about the 3rd day of June, 1937, the plaintiff wrote to Mr. C. Leslie Weir, who was the project engineer representing the government, in charge of said project, as per copy of letter hereto attached and made a part of this affidavit. 129

That the plaintiff also mailed a copy of said letter to the defendant, Fleisher Engineering & Construction Co., by depositing said copy in a Post Office box maintained by

130 the United States Government as a receptacle for mail in the vicinity of plaintiff's office on Pearl Street in the City of Buffalo, N. Y., on the 3rd day of June, 1937, which notice was addressed, in a postpaid wrapper, to the said defendant, Fleisher Engineering & Construction Co. at Langfield Drive, Buffalo, N. Y., and your deponent, on or about the 5th day of June, 1937, received a reply from Mr. C. Leslie Weir, as per copy of letter attached and made a part hereof.

That no part of the said sum of $1012.87 and interest has ever been paid to the plaintiff.

131 This plaintiff has been informed by his counsel that under date of March 1, 1939, this Court granted an order determining that said method of service was sufficient under the provisions of the Miller Act and your deponent verily believes that there is no defense to this action.

WHEREFORE, deponent prays that defendants' Answer be stricken out and judgment directed to be entered thereon in favor of the plaintiff for the said sum of $1012.87, with interest from the 1st day of December, 1937, and the costs of this action and of this motion.

132 GEO. S. HALLENBECK.

Sworn to before me this
17th day of April, 1939.
Edwin J. Culligan,
Notary Public, Erie County.

Endorsed:

Filed April 20, 1939.

Affidavit of George S. Hallenbeck on Motion.

HALLENBECK INSPECTION AND TESTING LABORATORY
Francis Building
56-62 Pearl St.
Buffalo, N. Y.

Date: March 31st, 1937

Invoice No. 310

Easthom-Melvin Co.,
Langfield Drive,
Buffalo, N. Y.

TERMS: NET CASH 2%—10 days

To testing materials for Kenfield Housing Project, Docket H-6703 (ERA) N. Y.
6" x 12" CONCRETE CYLINDERS

Date	*Lab. No.*	*Test No.*	*Age*
3/2	13673	259A & 259B	7 days
3/3	13676	260A & 260B	7 "
3/4	13677	261A & 261B	7 "
3/5	13689	262A & 262B	7 "
3/8	13695	264A & 264B	7 "
3/9	13701	265A & 265B	7 "
3/10	13702	266A & 266B	7 "
3/11	13703	267A & 267B	7 "
3/12	13710	268A & 268B	7 "
3/15	13713	270A & 270B	7 "
3/16	13721	271A & 271B	7 "
3/17	13722	272A & 272B	7 "
3/18	13727	273A & 273B	7 "
3/19	13732	274A & 274B	7 "
3/20	13733	275A & 275B	7 "
3/22	13742	276A & 276B	7 "

136

Date	*Lab. No.*	*Test No.*	*Age*
3/22	13745	279A	5 days
3/23	13743	277A & 277B	7 "
3/24	13744	278A & 278B	7 "
3/24	13745	279B	7 "
3/25	13751	280A & 280B	7 "
3/26	13754	281A & 281B	7 "
3/29	13757	282A & 282B	7 "
3/30	13761	283A & 283B	7 "
3/31	13763	284A & 284B	7 "

48 tests @ $1.40 each $72.00

137 24 cylinder molds filled but not tested

24 molds @ 10¢ each 2.40

See Sheet No. 2

HALLENBECK INSPECTION AND TESTING LABORATORY

Francis Building
56-62 Pearl St.
Buffalo, N. Y.

138

Date: March 31st, 1937

Invoice No. 310

Sheet No. 2
Easthom-Melvin Co.,
Langfield Drive,
Buffalo, N. Y.

TERMS: NET CASH 2%—10 days

Portland Cement

Date	*Lab. No.*	*Carrier*	*Bbls.*	*Brand*
3/4	13032	Truck	750	Federal
3/11	"	"	500	"

Affidavit of George S. Hallenbeck on Motion.

Date	*Lab. No.*	*Carrier*	*Bbls.*	*Brand*	
3/18	13032	Truck	500	Federal	139
3/25	"	"	550	"	
3/31	"	"	465	"	
			2765 @ 2¢ per Bbl.		$55.30

Concrete Specimens

Date	*Lab No.*	*Sample Mark*		
3/23	13756	Block #5, Building #1		
		1 Specimen @ $2.75.....	2.75	
		Time of Inspector W. Hallenbeck at Building Site for month of March 25 days time @ $8.50 per day	212.50	140
		Time of Inspectors Thos. F. Joyce & E. S. Pittaway at Mixing Plant of Genesee Sand & Gravel Co., for Month of March, 1937—26 days time @ $7.75 per day	201.50	
			$546.45	141
			4.80	
			$541.65	

142 HALLENBECK INSPECTION AND TESTING LABORATORY

Francis Building
56-62 Pearl St.

Buffalo, N. Y.

Date: April 30, 1937
Invoice No. 407

Sheet 2
Easthom-Melvin Co.,
Langfield Drive,
143 Buffalo, N. Y.

TERMS: NET CASH 2%—10 days

Portland Cement

Date	*Lab. No.*	*Carrier*	*Bbls.*	*Brand*
4/8	13032	Truck	100	Federal
4/16	"	"	523	"
4/22	"	"	430	"
4/29	"	"	183	"

144

1236 @ 2¢ per bbl. $24.72

Time of Inspector—W. Hallenbeck at building site for Month of April, 1937
22 days @ $8.50 per day 187.00

Time of Inspector—Edwin Pittaway at Plant of Genesee Sand & Gravel Co.,
24 days @ $7.75 per day 186.00

$442.37

Affidavit of George S. Hallenbeck on Motion.

HALLENBECK INSPECTION AND TESTING LABORATORY 145

Francis Building
56-62 Pearl St.
Buffalo, N. Y.

Date: April 30, 1937
Invoice No. 407

Sheet No. 1

Easthom-Melvin Co.,
Langfield Drive
Buffalo, N. Y.

TERMS: NET CASH 2%—10 days 146

To testing materials for Kenfield Housing Project, Docket H-6703 (ERA) N. Y. (S)

6" x 12" Concrete Cylinders

Date	*Lab. No.*	*Test No.*	*Age*
4/1	13765	285A & 285B	7 days
4/2	13775	286A & 286B	7 "
4/5	13778	287A & 287B	7 "
4/6	13779	288A & 288B	7 "
4/7	13781	289A & 289B	7 "
4/8	13786	290A & 290B	7 "
4/9	13792	291A & 291B	7 "
4/16	13822	293A & 293B	7 "
4/19	13757	282C	28 "
	13831	294A & 294B	7 "
4/20	13832	295A & 295B	7 "
4/21	13838	296A & 296B	7 "
4/26	13849	297A & 297B	7 "
4/27	13855	298A & 298B	7 "
4/28	13863	299A & 299B	7 "

147

148

29 Tests @ $1.40 each $40.60
13 Cylinders not tested @ 10¢ each 1.30

Job Secured Blocks

Date	*Lab. No.*	*Location—Secured from Block 11, Bldg. 5*
4/6	13796	Size—4" x 4" x 2½" High 2.75

See Sheet No. 2

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HALLENBECK INSPECTION AND TESTING LABORATORY

Francis Building
56-62 Pearl St.,
BUFFALO, N. Y.

Date: May 10th, 1937
Invoice No. 509

Easthom-Melvin Co.,
233 Langfield Drive,
Buffalo, N. Y.

TERMS: NET CASH 2% — 10 days

150

To Testing Materials for Kenfield Housing Project, Docket H-6703 (ERA) NY (S) *6" x 12" Concrete Cylinders*

Date	Lab. No.	Test No.	Age
5/3	13876	300A & 300B	7 Days
5/4	13877	301A & 301B	7 "

4 tests @ $1.40 each.....$ 5.60
Time of Inspector at Plant of Genesee Sand & Gravel Co., E. S. Pittaway—

Affidavit of George S. Hallenbeck on Motion.

May 3, 4 & 5th
3 days @ $7.75 per day 23.25 151

$28.85

FINAL BILL

Docket H-6703 (ERA) NY (S)
June 3rd, 1937.

860.1

Re:—Kenfield Housing Project
Payment of Accounts
Easthom-Melvin, Sub-Contractor 152

C. Leslie Weir, Project Engineer,
Langfield Drive,
Buffalo, N. Y.

Dear Sir:

We list below invoices of March, April and May covering inspection and testing work on the Kenfield Housing Project, for which we are unable to secure payment.

March—Invoice #310	.....	$ 541.65
April —Invoice #407	.....	442.37
May —Invoice #509	.....	28.85

153

$1012.87

The Easthom-Melvin Co., have referred us to the Maryland Casualty Co., for payment of these accounts.

Our contract agreement with Easthom-Melvin gives the usual trade discount of 2%—10 days or 30 days net.

The Maryland Casualty Co., local office advises that they have taken the matter of payment up with the home office but to date have been unable to get instructions to pay.

154 As these invoices chiefly cover labor, payment should be made promptly. We would appreciate any assistance you may be able to give to the end that we will be paid promptly for this work.

Very truly yours,

HALLENBECK INSPECTION & TESTING LABORATORY
Geo. S. Hallenbeck, President.

GSH:LW
CC: Fleisher Engr. & Constr. Co.

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FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

215 Langfield Drive
Buffalo, New York

June 5, 1937

In Reply Please Refer to
Inspection: CLW; ds
Docket H-6703 (ERA) NY(S)
Kenfield Housing

156 Hallenbeck Inspection & Testing Laboratory,
56 Pearl Street,
Buffalo, N. Y.

Gentlemen:

This will acknowledge your communication of June 3rd, containing a complaint on account of non-payment to you for services rendered to the Easthom-Melvin Company, a subcontractor of the Fleisher Engineering & Construction Company on the above project.

Order Directing Judgment Appealed From Captioned at March 1939, Stated Term, Dated May 1, 1939.

157

We will take this matter up with the General Contractor and will advise you further.

Most sincerely yours,

(SIGNED) C. LESLIE WEIR
Project Engineer

3 cc Wash.
1 cc file

Order Directing Judgment Appealed From Captioned at March 1939, Stated Term, Dated May 1, 1939. 158

(Name of Court and Title of Action.)

Motion on behalf of the plaintiff, United States of America, for the use and benefit of George S. Hallenbeck doing business under the assumed name and style of Hallenbeck Inspection and Testing Laboratory, pursuant to Rule 56 of the Rules of Civil Procedure for a summary judgment in favor of the plaintiff and against the defendants, Royal Indemnity Company, Maryland Casualty Company, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., for the relief demanded in the complaint in this action. 159

Appearances: Edwin J. Culligan, Esq., counsel for the plaintiff, in support of said motion.

Frank Gibbons, Esq., counsel for the defendants in opposition to said motion.

Papers read and filed by moving parties in support of motion: Complaint in the action; separate answers of the defendants, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co.,

Order Directing Judgment Appealed From Captioned at March 1939, Stated Term, Dated May 1, 1939.

160 Royal Indemnity Company and Maryland Casualty Company; Interrogatories served upon the attorney for the plaintiff on the 8th day of December, 1938, filed in the office of the Clerk of this Court on the 9th day of December, 1938; Replies to said Interrogatories duly filed in the office of the Clerk of this Court; Notice of Motion made by the said defendants for a Summary Judgment under Rule 56 of the Rules of Civil Procedure and all documents submitted by the said defendants in support of said motion; Order duly granted by this Court on the 1st day of March, 1939, denying the said Motion for Summary Judgment made on be-
161 half of said defendants; Notice of Motion for Summary Judgment in behalf of plaintiff and against the said defendants; the Affidavit of George S. Hallenbeck, verified the 17th day of March, 1939.

The motion having come on to be heard on the 1st day of May, 1939, and due deliberation having been had thereon,

NOW, upon motion of EDWIN J. CULLIGAN, ESQ., attorney for the plaintiff, it is

ORDERED that judgment be entered herein in favor of
162 the above named plaintiff and against the above named defendants, Royal Indemnity Company, Maryland Casualty Company, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., for the sum of Ten hundred twelve dollars and eighty-seven cents ($1012.87), with interest thereon from the 1st day of December, 1937, together with the costs and disbursements of this action.

JOHN KNIGHT,
U. S. District Judge.

Endorsed:

Filed Jun. 9, 1939.

Judgment Appealed From.

(Name of Court and Title of Action.)

163 The plaintiff in the above entitled action, having duly moved this Court, pursuant to Rule 56 of the Rules of Civil Procedure, for a summary judgment in favor of the plaintiff and against the defendants, Royal Indemnity Company, Maryland Casualty Company, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., for the relief demanded in the complaint in this action, and said Court having made an order that judgment be entered herein in favor of the above named plaintiff and against the above named defendants for the relief demanded in said complaint,

164 NOW, on motion of Edwin J. Culligan, attorney for said plaintiff, it is

ADJUDGED that the said plaintiff recover judgment against the defendants, Royal Indemnity Company, Maryland Casualty Company, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., for the sum of Ten hundred twelve dollars and eighty-seven cents ($1012.87), with interest thereon from the 1st day of December, 1937, in the sum of Ninety dollars and sixteen cents ($90.16), together with the costs and dis- 165 bursements of this action as taxed, in the sum of Twenty-seven dollars and fifty cents ($27.50), amounting in all to the sum of Eleven hundred thirty dollars and fifty-three cents ($1130.53), and have execution therefor.

JUDGMENT signed this 9th day of June, 1939.

MAY C. SICKMON,
Clerk of the Court.

Endorsed:

Filed June 9, 1939.

Assignment of Errors.

(Name of Court and Title of ~~Action.~~)

166 And now on this 13th day of June, 1939, came the defendants, Fleisher Engineering & Construction Co., Joseph A. Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company, and Maryland Casualty Company, by Gibbons, Pottle & Pottle, their attorneys, and say that the final judgment entered in the above cause on the 9th day of June, 1939, is erroneous and unjust to the said defendants, Fleisher Engineering & Construction Co., Joseph A. Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company, and Maryland Casualty Company;

167 FIRST: Because in the order dated March 1, 1939, and entered in the office of the Clerk of the United States District Court, for the Western District of New York, on the 3rd day of March, 1939, the court denied the motion of the said defendants for a summary judgment pursuant to Rule 56 of the Rules of Civil Procedure, whereas the said motion should have been granted and a summary judgment should have been rendered in favor of the said defendants and against the plaintiff, dismissing the action with costs.

168 SECOND: Because in the order dated May 1, 1939 and entered in the office of the Clerk of the United States District Court for the Western District of New York, on the 9th day of June, 1939 the court granted the motion of the plaintiff for a summary judgment pursuant to Rule 56 of the Rules of Civil Procedure, and directed a judgment in favor of the plaintiff, and against the above named defendants, Royal Indemnity Company, Maryland Casualty Company, Fleisher Engineering & Construction Company, and Joseph A. Bass, doing business as Joseph A. Bass Co., in the sum of $1012.87, whereas the said motion should have been denied.

THIRD: Because the court erred in entering final judg- 169
ment in this action in favor of the United States of America, for the use and benefit of George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspecting & Testing Laboratories, and against the defendants, Fleisher Engineering & Construction Company, Joseph A. Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company, and Maryland Casualty Company, for the sum of $1103.03 damages and $27.50 costs, amounting in all to $1130.53, in that the law and the facts are not sufficient to sustain such judgment against the said defendants, whereas it should have adjudged and directed 170
that the complaint in this action be dismissed as to each and all of the said defendants.

WHEREFORE the defendants, Fleisher Engineering & Construction Company, Joseph A. Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company, and Maryland Casualty Company, pray that the said judgment hereinbefore mentioned be reversed and that a new trial be ordered, or that the United States Circuit Court of Appeals for the Second Circuit render a proper judgment on the record.

171

Dated, Buffalo, N. Y. June 13, 1939.

FRANK GIBBONS,
One of the Attorneys for the Defendants,
Fleisher Engineering & Construction
Company, Joseph A. Bass,
Royal Indemnity Company and
Maryland Casualty Company,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

Endorsed:

Filed June 13, 1939.

Supersedeas Bond.

(Name of Court and Title of Action.)

172 KNOW ALL MEN by these presents that the United States Fidelity & Guaranty Company, a corporation created, organized and existing under and by virtue of the laws of the State of Maryland, having its principal place of business in the City of Baltimore, State of Maryland, and duly authorized to carry on a general casualty insurance business within the State of New York, and in the courts of the United States, is held and firmly bound unto United States of America for the use and benefit of George S. Hallenbeck, doing business under the assumed name and style of Hal-
173 lenbeck Inspecting & Testing Laboratories, in the full and just sum of two thousand two hundred sixty-five dollars ($2265.00) to be paid to the said plaintiff, United States of America, for the use and benefit of George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspecting & Testing Laboratories, its attorneys, administrators, executors, successors, or assigns, to which payment well and truly to be made it binds itself, its successors and assigns firmly by these presents.

Signed and sealed this 12th day of June, 1939.

174 WHEREAS lately at a Stated Term of the United States District Court for the Western District of New York in the suit pending in the said court between United States of America, for the use and benefit of George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspecting & Testing Laboratories, as plaintiff, and Fleisher Engineering & Construction Co., Joseph A. Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company and Maryland Casualty Company, et al., in a civil

action No. 2193-A, final judgment was rendered in 175
favor of the said plaintiff, United States of America, for the use and benefit of George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspecting & Testing Laboratories, and against the defendants, Fleisher Engineering & Construction Co., Joseph A. Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company, and Maryland Casualty Company, et al., to the effect that the said plaintiff recover a judgment against the said defendants Royal Indemnity Company, Maryland Casualty Company, Fleisher Engineering & Construction Co., and Joseph A. Bass doing business as Joseph A. Bass Co., for 176
the sum of one thousand one hundred and three dollars and three cents ($1103.03) damages and interest, together with twenty-seven dollars and fifty cents ($27.50) costs, amounting in all to the sum of one thousand one hundred thirty dollars and fifty-three cents ($1130.53);

Now the condition of the above obligation is such that if the said appellants, Royal Indemnity Company, Maryland Casualty Company, Fleisher Engineering & Construction Co., and Joseph A. Bass, doing business as Joseph A. Bass Co., shall prosecute their appeal to effect and answer 177
to the plaintiff, United States of America, for the use and benefit of George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspecting & Testing Laboratories, for the satisfaction of the judgment in full together with costs, interest and damages for delay, if for any reason the appeal is dismissed or the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interests and damages as the Ap-

178 pellate Court may adjudge and award, then the above obligation to be void else to remain in full force and virtue.

UNITED STATES FIDELITY & GUARANTY COMPANY,
By R. C. McPHERSON,
Attorney in fact (Seal)

Endorsed:

Filed June 13, 1939.

Notice of Appeal.

179 (Name of Court and Title of Action.)

SIRS:

YOU WILL PLEASE TAKE NOTICE that the defendants, Royal Indemnity Company, Maryland Casualty Company, Fleisher Engineering & Construction Company, and Joseph A. Bass, doing business under the name of Joseph A. Bass Co., hereby appeal to the United States Circuit Court of Appeals, for the Second Circuit, from the final judgment entered in the office of the Clerk of the United States District Court for the Western District of New York.
180 on the 9th day of June, 1939, and from each and every part thereof.

Dated: Buffalo, N. Y., June 13, 1939.

Yours, etc.,

FRANK GIBBONS,
One of the Attorneys for the Defendants,
Fleisher Engineering & Construction Company,
Joseph A. Bass, Royal Indemnity Company, and
Maryland Casualty Company,
618-630 Walbridge Building,
Buffalo, N. Y.

Stipulation to Record.

To: 181

Hon. May C. Sickmon,
Clerk of the United States District Court,
For the Western District of New York.
and to
Edwin J. Culligan, Esq.,
Attorney for the Plaintiff.

Endorsed:

Filed June 13, 1939.

Stipulation to Record. 182

(Name of Court and Title of Action.)

IT IS HEREBY STIPULATED AND AGREED by and between the counsel for the respective parties hereto that the appeal by the defendants, Fleisher Engineering & Construction Co., Joseph A. Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company, and Maryland Casualty Company, from the final judgment entered in this action on the 9th day of June, 1939 to the United States Circuit Court of Appeals, for the Second Circuit, be heard and determined on the foregoing record and the papers 183 therein contained, which shall constitute the transcript of record on such appeal, consisting of the following documents:

1. Complaint of the use plaintiff.

2. Praecipes for appearance of defendants, Fleisher Engineering & Construction Co. and Royal Indemnity Company, and for voluntary appearance of the defendants Joseph A. Bass, doing business as Joseph A. Bass Co., and Maryland Casualty Company.

184 3. Separate answers of the defendants, Fleisher Engineering & Construction Co., Joseph A. Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company and Maryland Casualty Company.

4. Interrogatories under Rule 33.

5. Answers to interrogatories.

6. Notice of motion on behalf of the defendants for summary judgment.

7. Order denying defendant's motion for summary judgment.

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8. Opinion of Hon. John Knight, rendered on motion by defendants for summary judgment.

9. Opinion of Hon. John Knight rendered on motion by defendants for summary judgment in the case of United States of America for the use and benefit of J. H. Welch Company.

10. Notice of motion on behalf of plaintiff for summary judgment.

11. Affidavit of George S. Hallenbeck.

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12. Order directing summary judgment for plaintiff.

13. Final judgment entered pursuant to the order.

14. Assignment of errors.

15. Supersedeas bond.

16. Notice of appeal.

IT IS FURTHER STIPULATED that a summons was duly issued upon the complaint and served upon defendant,

Fleisher Engineering & Construction Co. by the United States Marshal for the Western District of New York on April 13, 1938, and on the defendant, Royal Indemnity Company, by the United States Marshal for the Southern District of New York on the 11th day of April, 1938, and that proof of such service was filed in the clerk's office on April 13, 1938, and that any and all portions of the record omitted from the foregoing is unimportant upon any question to be presented to the court upon this appeal. 187

Dated, Buffalo, N. Y., June 30th, 1939.

FRANK GIBBONS,
One of the Attorneys for the Appellants. 188

EDWIN J. CULLIGAN,
Attorney for Plaintiff.

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Clerk's Certificate.

(Name of Court and Title of Action.)

190

I, MAY C. SICKMON, Clerk of the United States District Court, for the Western District of New York, do hereby certify that the foregoing is a correct transcript of the record of the United States District Court, for the Western District of New York, in the above entitled action as agreed upon by the parties as shown by the stipulation hereto annexed.

IN WITNESS WHEREOF I have caused the seal of the said court to be hereunto affixed at the City of Buffalo, in the Western District of New York, this 5th day of July,
191 in the year One Thousand Nine Hundred and Thirty-nine and in the Independence of the United States of America in the One Hundred and Sixty-third Year.

MAY C. SICKMON,
Clerk.

(Seal)

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[fol. 65] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1939

No. 75

(Argued October 6, 1939. Decided November 13, 1939)

UNITED STATES OF AMERICA, for the Use and Benefit of George S. Hallenbeck, Doing Business under the Assumed Name and Style of Hallenbeck Inspection and Testing Laboratory, Plaintiff-Appellee,

against

FLEISHER ENGINEERING & CONSTRUCTION CO., JOSEPH A. BASS, Doing Business as Joseph A. Bass Co., Royal Indemnity Company and Maryland Casualty Company, Defendants-Appellants, and Other Defendants Named But Not Served With the Summons

Appeal from United States District Court for the Western District of New York

The above action was brought by the United States under the so-called Miller Act of August 24, 1935, Chapter 642, Sections 1, 2, 3 and 4, (40 U. S. C. A. Sections 270a, 270b, 270c [fol. 66] and 270d), to recover upon a government payment bond for labor and materials furnished in the construction of the superstructure of Kenfield Housing Project H-6703 in Buffalo, N. Y. The bond was furnished by the contractors Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., to the United States, wherein the contractors were principals, and Royal Indemnity Company and Maryland Casualty Company and others were sureties. From a summary judgment for $1,130.53 entered on motion of the plaintiff against the defendants Fleisher Engineering & Construction Co., Joseph A. Bass, doing business as Joseph A. Bass Co., and their sureties Royal Indemnity Company and Maryland Casualty Company, the latter appeal. Affirmed.

Before L. Hand, Swan and Augustus N. Hand, Circuit Judges

Gibbons, Pottle & Pottle, Attorneys for Defendants-Appellants; Frank Gibbons, Counsel.

Edwin J. Culligan, Attorney and counsel for Plaintiff-Appellee.

AUGUSTUS N. HAND, Circuit Judge:

George S. Hallenbeck, doing business under the name of Hallenbeck Inspection & Testing Laboratory, performed certain work during the months of March, April and May, 1937, in inspecting and testing materials on the Kenfield Housing Project No. H-6703 at Buffalo under an agreement [fol. 67] with Easthom-Melvin Co., Inc., whereby he was to be paid by the latter $1,012.87.

The United States acting through the Federal Administrator of Public Works entered into a contract with Fleisher Engineering & Construction Co. and Joseph A. Bass (doing business as Joseph A. Bass Co.) whereby the latter were to furnish all the labor and materials and perform all work required for the construction of the superstructure for the Housing Project. The Easthom-Melvin Co., Inc., was a subcontractor of these concerns, and the labor performed by Hallenbeck under his agreement with the Easthom-Melvin Co., Inc., was required to be performed by Fleisher Engineering & Construction Co. and Bass under their contract with the United States and actually was performed with the knowledge, consent and approval of the main contractors. The Easthom-Melvin Co., Inc., neglected to pay Hallenbeck the amount which was admittedly owing to him. Thereupon, within ninety days after the date when payment became due, he wrote to the project engineer who represented the government in superintending the performance of the contract a letter notifying the engineer of his claim and of the default of Easthom-Melvin Co., Inc., in paying it and sent a copy of the letter by mail in a postpaid envelope to Fleisher Engineering & Construction Co. Each notification was received, but the letter sent to Fleisher Company was sent by ordinary, and not by registered, mail. A copy of the letter of notification was not mailed to Bass. The notice showed on its face the amount claimed by Hallenbeck, that his contract was with the Easthom-Melvin Co., Inc., and that the items were for inspection and testing work.

The United States brought the present suit on behalf of Hallenback to recover upon a payment bond furnished by Fleisher Engineering & Construction Co. and Joseph A. Bass, the contractors, and by Royal Indemnity Company and Maryland Casualty Company as sureties. Under this [fol. 68] bond, which was in standard government form, the

contractors and the sureties bound themselves in the amount of $79,988 jointly and severally as follows:

"If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue."

The plaintiff moved for a summary judgment upon the claim of Hallenbeck which was granted by Judge Knight. From that judgment an appeal was taken to this court.

The Miller Act (U. S. C. A. § 270a (2) requires persons entering into a contract for the construction of any public work of the United States to furnish "a payment bond with a surety or sureties * * * for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person." The bond upon which this suit was brought was furnished in pursuance of the Act.

The Act (U. S. C. A. § 270b, subdivisions (a) and (b),) defines the rights of persons furnishing labor or materials for a public contract in respect of which a payment bond has been furnished as follows:

"(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, * * * and who has not been paid in full therefore before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such [fol. 69] payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the ma-

terial for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons."

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit."

[fol. 70] The only question for consideration is whether in view of the provisions of Section 270b, subdivision (a) of the Miller Act Hallenbeck, called in the briefs "the use plaintiff", gave sufficient notice to the original contractors to enable him to bring suit on the payment bond.

We feel no doubt that the notice complied with the statute as to its contents. It was not, however, sent by registered but only by ordinary mail and therefore did not conform to the provisions of Section 270b (a) in respect to method of mailing. Furthermore, it was only mailed to Fleisher Engineering & Construction Co. and no separate notice was mailed to Joseph A. Bass. On a motion for summary judgment made by the United States on behalf of Hallenbeck the District Court held that the notice sent to Fleisher Engineering & Construction Co. by ordinary mail satisfied the requirements of the statute and that such a notice to one of the contractors was sufficient to bind the other. We hold that his disposition of the motion was correct and accordingly that the judgment should be affirmed.

It is admitted that the notice was in writing and sent by mail and reached one of the two contractors who had jointly and severally agreed to perform the contract. The statute

does not in terms make sending a notice by "registered mail" a condition of a right of action by or on behalf of one furnishing labor or materials in the prosecution of the work provided for in a public contract and we are confident that Section 270b, subdivision (a) should receive no such interpretation.

It is to be observed that subdivision (a) affords a right of action to a person in Hallenbeck's situation "upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor. * * *" The following sentence provides how the notice is to be served but contains no language making the right of action dependent upon the mode of service. The [fol. 71] object of requiring notice to the principal contractor was doubtless to enable him to withhold payments from a subcontractor until the latter should pay his own men who had worked on the job. The apparent purpose of providing for notice by "registered mail" was to insure receipt of the notice. But where, as here, receipt of a written notice is conceded, the mode of transmission becomes unimportant and the provisions as to mode of delivery should be regarded as directory and not mandatory.

A statute like the present, giving a remedy on a payment bond to laborers and materialmen, is remedial and under the authorities should be liberally construed. That this is the proper rule of interpretation would appear from the decision of the Supreme Court in A. Bryant Co. v. N. Y. Steam Fitting Co., 235 U. S. 327, 337. There the third proviso of the amended Materialmen's Act, requiring notice by a creditor bringing suit on a payment bond to be given to other creditors was held not to impose a condition upon the imposition of liability on the surety. See also Fleischmann v. United States, 270 U. S. 349, 360; Illinois Surety Co. v. John Davis Co., 244 U. S. 376, and Vermont Marble Co. v. National Surety Co., 213 Fed. 429, (C. C. A. 3).

The decisions by the Supreme Court of Kansas in Breedlove v. General Baking Co., 138 Kan. 143; Eckl v. Sinclair Refining Co., 133 Kan. 285; Honn v. Elliott, 132 Kan. 454, and Weaver v. Shanklin Walnut Co., 131 Kan. 771, cited by Judge Knight in the court below, apparently support his view that the provision of the Miller Act for giving notice to the contractor by registered mail is merely directory. The Kansas statute provided that "no proceedings for compen-

sation shall be maintainable * * * unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such claim to him by registered mail * * *". Such language may have been thought by [fol. 72] its express terms to have created a condition upon which all rights of action were predicated. In Breedlove v. General Baking Co., 138 Kan. 143, on which the defendants lay much stress, proof of delivery of the notice of claim was lacking. The claimant relied on a presumption of delivery arising from mailing, though there was no proof that the notice bore the correct address of the employer, or that it was received. In the other three Kansas decisions notices sent otherwise than by registered mail having been actually received were treated as satisfying a statute providing for delivery by registered mail.

The defendants in the present case chiefly rely on the decision of this court in Mason & Hanger Co. v. Sharon, 219 Fed. 526. There a section of the New York Employers' Liability Act provided that notice of the injury should be addressed to the principal place of business. The notice was sent to a branch office and it was held that such a method of giving notice was insufficient even though the notice was received. It could be argued perhaps that a notice addressed to a branch office might not reach the proper official so that the provision requiring notice to be sent to the principal office was to be regarded as mandatory, but unless that decision can be distinguished from the case at bar in this way, we cannot see how the result was justified.

In Rogers v. Village of Port Chester, 234 N. Y. 182, a provision of a village charter that a notice of claim should be presented to a designated village official was held mandatory. But there the charter provided that: "The omission to present any such claim in the manner and within the time mentioned shall be a bar to any action against the village * * *".

Appellants' contention that notice to Fleisher Engineering & Construction Co. alone, even though sufficient in respect to manner and form, did not bind Joseph A. Bass, a joint contractor, is clearly without merit. Notice to one of two [fol. 73] joint obligors or contractors has from ancient times been held to convey notice to the other in respect to matters affecting the joint adventure or obligation. Tevis v. Ryan,

233 U. S. 273, 287; Northern Ill. Coal Co. v. Cryder, 361 Ill. 274; Knight v. Fifield, 7 Cush. 263; Morse v. Aldrich. 1 Met. 544; Terry & Lowe v. Reding, Moore 555.

In Babcock v. Wells, 25 R. I. 23, and Snyder v. Sponable, 1 Hill (N. Y.) 567, notice to one having a joint interest was held insufficient to bind the other. But in neither of the two cases was there such a joint enterprise as to justify the inference that one party was authorized to receive notice that would be binding on the other. The parties there were only joint owners of a mortgage and joint purchasers of an interest in real estate respectively. In Rogers v. Burr, 105 Ga. 432, the agency of the person receiving the notice was found to have been for a limited purpose which had been fulfilled long before the notice was given. If that decision can be thought to cover a situation like the present, it would, we think, be against the clear weight of authority. Persons jointly contracting to erect a building so much resemble partners in their mutual relations that notice to one of them of the claims of third parties arising out of the joint adventure would seem, as a matter of common sense and business understanding, to be notice to the other.

The judgment for the plaintiff is affirmed.

[fol. 74] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of December one thousand nine hundred and thirty-nine.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

UNITED STATES ex rel. GEORGE S. HALLENBECK, etc., Plaintiff-Appellee,

vs.

FLEISHER ENGINEERING & CONSTRUCTION Co., et al., Defendants-Appellants, and Other Defendants Named But Not Served With the Summons

Appeal from the District Court of the United States for the Western District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 75] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States ex rel. George S. Hallenbeck, etc., v. Fleisher Engineering & Construction Co., et al., and other defendants named but not served with the summons. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 12, 1939. D. E. Roberts, Clerk.

[fol. 76] UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 75, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States ex rel. George S. Hallenbeck, etc., Plaintiff-Appellee, against Fleisher Engineering & Construction Co., et al., Defendants-Appellants, and other defendants named but not served with the summons, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 15th day of December, in the year of our Lord one thousand nine hundred and thirty-nine, and of the Independence of the said United States the one hundred and sixty-fourth.

D. E. Roberts, Clerk. (Seal.)

SUPREME COURT OF THE UNITED STATES

ORDER GRANTING PETITION FOR REHEARING AND ALLOWING CERTIORARI—April 22, 1940

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

A petition for rehearing having been filed in this case upon the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court that the said petition be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 726 15

FLEISHER ENGINEERING & CONSTRUCTION CO. AND JOSEPH A. BASS, DOING BUSINESS AS JOSEPH A BASS CO., ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF GEORGE S. HALLENBECK, DOING BUSINESS UNDER THE ASSUMED NAME AND STYLE OF HALLENBECK INSPECTION AND TESTING LABORATORY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

FRANK GIBBONS,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 726

FLEISHER ENGINEERING & CONSTRUCTION CO. AND JOSEPH A. BASS, DOING BUSINESS AS JOSEPH A. BASS CO., ROYAL INDEMNITY COMPANY AND MARYLAND CASUALTY COMPANY, DEFENDANTS-APPELLANTS IN COURT BELOW,

Petitioners,

vs.

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF GEORGE S. HALLENBECK, DOING BUSINESS UNDER THE ASSUMED NAME AND STYLE OF HALLENBECK INSPECTION AND TESTING LABORATORY, APPELLEE IN COURT BELOW,

Plaintiff-Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Honorable Associate Justices of the United States Supreme Court.

Fleisher Engineering & Construction Co., Joseph A. Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company, and Maryland Casualty Company, respectfully

pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered on the 12th day of December, 1939, in the action entitled United States of America for the use and benefit of George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspecting & Testing Laboratory against Fleisher Engineering & Construction Co., Joseph A. Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company, and Maryland Casualty Company (R. 71) which affirmed a judgment of the United States District Court, for the Western District of New York, in said action hereinafter referred to.

Opinions Below

1. An opinion was written in the United States Circuit Court of Appeals by Hon. Augustus N. Hand (R. 65-71), published 107 F. (2d) 925.

2. Opinion of Hon. John Knight, District Judge, rendered in this action (R. 34) (Not published).

3. Opinion of Hon. John Knight, District Judge, rendered in a companion action (R. 35-40) (Not published).

Judgment in District Court

Judgment in favor of United States of America for the use and benefit of George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspecting & Testing Laboratory against Royal Indemnity Company, Maryland Casualty Company, Fleisher Engineering & Construction Co., and Joseph A. Bass, doing business as Joseph A. Bass Co., for $1,130.53 (R. 55), order pursuant to which judgment was entered (R. 53 and 54), order denying previous motion on behalf of the defendants for summary judgment (R. 33).

Jurisdiction

The jurisdiction of the Supreme Court is invoked under the Judicial Code, section 240 (a), 28 U. S. C. A. 347, Act of February 13, 1925, c. 229, Sec. 1.

Statement as to Purpose and Nature of Action

This is an action at law brought in the United States District Court, for the Western District of New York, on August 24, 1938, by the United States of America, for the use and benefit of George S. Hallenbeck, d. b. a. Hallenbeck Inspecting & Testing Laboratory, as plaintiff, against Fleisher Engineering & Construction Co. and Joseph A. Bass, d. b. a. Joseph A. Bass Co. as principal, and Royal Indemnity Company, and Maryland Casualty Company, and others, as sureties, defendants, to recover the sum of $1,012.87 (R. 8), as the value of work and labor performed at the instance and request of Easthom Melvin Co. Inc. (R. 7). There was no direct contractual relationship between the use-plaintiff and any of the defendants. The Easthom Melvin Co., Inc. was a subcontractor of Fleisher Engineering & Construction Co. and Joseph A. Bass in performance of a contract between them and the United States of America, providing for the construction of superstructure of Kenfield Housing Project H-6703 in Buffalo, N. Y. under standard form of contract and government payment bond to the United States, and set forth in paragraphs sixth and seventh of the complaint (R. 5 and 6). The bond upon which recovery has been had was executed by the said contractors as principals, by the Royal Indemnity Company as surety to the extent of $359,946.00, and the defendant, Maryland Casualty Company, as surety to the extent of $79,988.00 (R. 6). The aforesaid defendants are the petitioners herein, and each of them appeared and interposed answers (R. 10-25). None of the other sureties named

in the bond were served with the summons nor in any manner appeared. The right of action depends upon whether or not the use-plaintiff has complied with the statute on the subject of notice which reads as follows:

> "Every person who has furnished labor or material in the prosecution of the work provided for in such contract in respect to which a payment bond is furnished * * * and who has not been paid in full therefor before the expiration of a period of ninety days after the date on which the last of the labor was done or performed by him, or materials furnished or supplied by him, for which such claim is made, shall have the right to sue on such payment bond for the amount or balance thereof unpaid at the time of institution of such suit and to prosecute such action to final execution and judgment for the sum or sums justly due him; provided, however, that any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied, or for whom the labor was done and performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office, or conducts his business, or his residence, or in any manner in which the United States Marshal of the District in which the public improvement is situated is authorized by law to serve summons."
>
> Act of August 24, 1935, Chapter 642, Sec. 2, 49 Stat. 794; 40 U. S. C. A. 270 b.

(See opinion of Hon. A. N. Hand, in court below (R. 66-68).)

After issue was joined your petitioners, as defendants in the action, served written interrogatories pursuant to the provisions of Rule 33 of the Rules of Civil Procedure (R. 26-28). Answers to those interrogatories were given by the use-palintiff (R. 29). The substance of it is that the use-plaintiff alleges that written notice under the statute was given to the defendant, Fleisher Engineering & Construction Co., on June 3, 1937.

That no separate notice was given to Joseph A. Bass but a claim was made that notice to the Fleisher Engineering & Construction Co. was also notice to Bass. It was also stated in answer to question No 7 that the notice "was delivered by mail and to the best of plaintiff's information and belief was received at the office of Fleisher Engineering & Construction Co., 233 Langfield Drive, Buffalo, N. Y., either on June 3, 1937, or June 4, 1937. It was sent by ordinary mail and was deposited in the United States Postoffice Box in the vicinity of 56 Pearl St., Buffalo, N. Y., on June 3, 1937, addressed to the said Langfield Drive address" (R. 29). In answer to the eighth interrogatory it is claimed that the notice to Fleisher Engineering & Construction Co. operated as notice to Joseph A. Bass (R. 29). The notice in question was appended to the answers (R. 30 and 31). It is directed to C. Leslie Weir, Project Engineer (R. 30, fol. 89, R. 51). C. Leslie Weir represented the United States Government, and not the contractors, or either of them (R. 43, fol. 129). Upon the pleadings, the interrogatories, and answers to the same, and the affidavit of George S. Hallenbeck (R. 41-44), the District Court granted the order directing the entry of judgment appealed from (R. 53 and 54).

Questions Litigated in the District Court

1. In order to maintain an action under this statute must the notice required thereby, when given by mail, "be served

by mailing the same by registered mail'' or may some other substituted service, not provided for in the statute operate as a compliance therewith?

2. Is a notice directed to an officer, or employee, of the United States government and not to the contractor, or to anyone representing the contractor, no matter how given, sufficient notice under said statute?

Errors to be Urged

The District Court and the Circuit Court of Appeals for the Second Circuit erred in refusing to grant your petitioner's motion for summary judgment dismissing the complaint and in granting the motion of plaintiff (respondent herein) for judgment appealed from.

Review Sought in This Court

Each of the foregoing questions are presented to this Court and your petitioners respectfully pray that the same may be reviewed thereby, to the end that the applicable rule may be finally and authoritatively settled.

Reasons for Granting the Writ

This action has been brought under the Federal statute (Miller Act above quoted), to recover upon a liability there given. The Federal courts are given exclusive jurisdiction of the action. All questions which arise thereunder are strictly Federal questions which must be determined by the Federal courts.

(A) The Circuit Court of Appeals for the Second Circuit has decided the Federal questions herein involved in a way probably in conflict with applicable decisions of this Court.

While the questions here presented have never been decided by this Court in any action brought under this statute, nor, as we believe, by any Circuit Court of Appeals,

other than the decision in this case, nevertheless this honorable Court has distinctly held in similar cases that wherever a right depends upon a statutory notice, the manner in which the statute requires the notice to be given must be exactly followed.

Thatcher v. *Powell,* 6 Wheat. 119, 5 L. Ed. 221.

The rule has been declared and followed in

Burck v. *Taylor,* 152 U. S. 634, 654, 38 L. Ed. 578, 585.

In all cases of statutory construction, the words of the statute, if plain and clear, furnish the infallible guide for its interpretation. The wisdom of the law itself is a question for congress only.

Board of Lake County Commissioners v. *Rollins,* 130 U. S. 662, 32 L. Ed. 1060, 1063;

Hamilton v. *Rathbone,* 175 U. S. 414, 419, 44 L. Ed. 219, 221;

Washington Market Co. v. *Hoffman,* 101 U. S. 112, 25 L. Ed. 782.

U. S. v. *Lexington Mill & Elevator Company,* 232 U. S. 399, 410, 58 L. Ed. 658, 662;

Crooks v. *Harrelson,* 282 U. S. 55, 60, 75 L. Ed. 156, 175;

25 Ruling Case Law, 982, 59 *C. J.* 984.

This Miller Act is a successor to a previous act called the Heard Act. While that act contained no provision for notice similar to the one required by the Miller Act, it did provide that

> "if no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials * * * shall be and are hereby authorized to bring suit in the name of the United States * * * against said contractor and his sureties and to prosecute the same to final judgment and execution; provided that where suit is in-

> stituted by any such creditors on the bond of the contractor it shall not be commenced until after the complete performance of the said contract and final settlement thereof and shall be commenced within one year after the performance and final settlement of the said contract, and not later; * * * ''

Act of February 24, 1905, c. 778, as amended by the Act of March 3, 1911, c. 231, Sec. 291; 40 U. S. C. A. 270.

Under that statute this Court has held that the limitations therein imposed are conditions precedent to the right to maintain the action and must be strictly followed, otherwise the court acquires no jurisdiction to entertain the action.

U. S. ex rel. Texas Portland Cement Co. v. *McCord,* 233 U. S. 157, 162, 58 L. Ed. 893, 897;

Harrisburg v. *Rickards,* 119 U. S. 199, 30 L. Ed. 358;

Illinois Surety Co. v. *U. S.,* 240 U. S. 214, 60 L. Ed. 609;

Pollard v. *Bailey,* 87 U. S. 527, 22 L. Ed. 376;

Fourth National Bank v. *Francklyn,* 120 U. S. 747, 30 L. Ed. 825.

The Miller Act adds another condition precedent, viz.: notice.

The decision of the Circuit Court of Appeals in the case at bar is believed to be in conflict in principle with a previous decision of the same court.

Mason & Hanger Co. v. *Sharon,* 219 Fed. 526.

(See opinion of Judge Hand in court below (R. 70).)

The United States District Court for the Southern District of New York, prior to the decision of the Circuit Court of Appeals in this case, had decided this exact proposition to the contrary in the case of *U. S. A. for use etc.* v. *Albert Development Co. et al.* The unpublished opinion of Mandelbaum, D. J., is hereto annexed and marked "Exhibit A".

Another decision rendered by the District Court for the Southern Division of the Northern District of Alabama in the case of the *United States of America for the use of Birmingham Slag Company, a corporation, against W. J. Perry, etc.*, is of similar import. No opinion has been written in that case, but the decision of Judge Murphree so far as pertinent is hereto annexed and marked Exhibit B.

(B) The Circuit Court of Appeals has decided the foregoing important question of Federal law which has not been but should be settled by this Court.

The statute is a new one and is applicable throughout the country. It is important that a rule of law be established which shall universally be followed.

The well established rules of law respecting the subject should not be considered to be abrogated without a decision of this Court on the subject.

Your petitioners respectfully refer to their brief which accompanies this petition for a further elucidation of their position.

For the reasons aforesaid your petitioners respectfully pray that this petition may be granted.

FLEISHER ENGINEERING & CONSTRUCTION CO.,
JOSEPH A. BASS,
ROYAL INDEMNITY COMPANY,
MARYLAND CASUALTY COMPANY,
By FRANK GIBBONS,
Their Counsel.

FRANK GIBBONS,
Counsel for Petitioners,
618-630 Walbridge Bldg.,
Buffalo, N. Y.

STATE OF NEW YORK,
County of Erie, ss:

Frank Gibbons, being duly sworn, says that he is over the age of twenty-one years, resides in the City of Buffalo, N. Y., and is counsel for each and all of the petitioners named in the foregoing petition; that he has read the said petition and knows the contents thereof, and that the statements of facts therein contained are true to the best of his knowledge, information and belief.

FRANK GIBBONS.

Subscribed and sworn to before me this 10th day of January, 1940.

GERTRUDE B. TOWNSEND,
[SEAL.] *Notary Public, Erie Co., N. Y.*

EXHIBIT "A".

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civ. 4-433

UNITED STATES OF AMERICA on Behalf of and for the Use of MORRIS SPECKLER PLUMBING SUPPLY CORPORATION, *Plaintiff*,

against

ALBERT DEVELOPMENT CORPORATION and NEW AMSTERDAM CASUALTY COMPANY, *Defendants*

Memorandum

The motion is to strike out the separate defenses of the defendants contained in their answer, and for further relief, the use-plaintiff seeks a bill of particulars regarding these defenses.

Summarized, the defenses plead the use-plaintiff's failure to comply with the provisions of the Miller Act, (40 U. S. C. A. Sec. 270 a, b, c, and d), in failing to forward a notice to the defendant by registered mail as required by the statute; that the defendants have paid the sub-contractor in full, who in turn has paid the use-plaintiff in full.

From the pleadings and affidavits, it appears that the notice was forwarded to the defendants by ordinary mail-unregistered. I believe from a reading of the statute, the provision for notification by registered mail is mandatory and that ordinary mailing is insufficient to comply with the statutory provision relating thereto. This is a suit between parties having no direct contractual relationship with each other, express or implied. A failure to strictly comply could often lead to fraudulent practices. I think it is immaterial whether or not the defendants had actual notice of non-payment. The defense is sufficient in law.

With respect to the request for a bill of particulars as to this defense, the motion is granted in part and the defendants are required to furnish the use-plaintiff within ten days from entry of this order only the particulars de-

manded in Items No. 5, 6, 6a, 6b and 6c of the use-plaintiff's notice of motion.

The defenses of payment are obviously sufficient in law. Payment from the subcontractor to the use-plaintiff in full must defeat the action.

With respect to the application for a bill of particulars as to these defenses, the same is denied. Payment is an affirmative defense to be pleaded and proven by the defendants, and the state courts have ruled that generally the defendants need not furnish particulars of such defense. (Yantze Ins. Co. vs. Stark & Co., 186 N. Y. Supp. 410; Elbin v. Equitable Life Assurance Soc., 177 App. Div. 458).

Settle order on two days' notice, in accordance with the above memorandum.

Dated, September 11th, 1939.

SAMUEL MANDELBAUM, *U. S. D. J.*

EXHIBIT "B".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

No. 4986.

UNITED STATES OF AMERICA for the Use of BIRMINGHAM SLAG COMPANY, a Corporation, *Plaintiff*,

vs.

W. J. PERRY, P. E. KIDDER, and UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation, *Defendants.*

Findings of Fact and Conclusions of Law.

This action having been tried upon the facts without a jury, the Court pursuant to Rule 52 finds the facts and states its conclusions of law as follows:

On, to wit, June 30, 1938, the United States of America, through its Department of Agriculture Farm Security Administration, for the consideration of $19,967.00 agreed to be paid, let a written contract to the defendant, W. J.

Perry, for the construction of a store and filling station as a part of the Cahaba Project of the said Farm Security Administration at Cahaba Subsistence Homesteads in Jefferson County, Alabama.

(Here follows *in extenso* provisions of the contract between the Agricultural Farm Security Administration and W. J. Perry followed by complete copy of the performance bond, then followed by complete copy of the payment bond.)

The provisions of the payment bond are in the usual form and so far as pertinent reads as follows:

The Condition of this Obligation is such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated June 30, 1938, for the complete construction of a brick veneer store and filling station, including plumbing and wiring, sidewalks, curb and gutter, pavement, gasoline storage tanks, etc. at the Cahaba Project of the Farm Security Administration, United States Department of Agriculture, in Jefferson County, Alabama.

Now, therefore, if the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

On July 7, 1938, the defendant, W. J. Perry, in writing sublet a part of said contract to the defendant, P. E. Kidder, Kidder's bid for such work as he was to perform being in the amount of $8,100.00. The last paragraph of said subcontract reads as follows:

> "Payments to be made as follows, we are to furnish you with money to pay your weekly payroll and the balance to be paid according to specifications as we are paid. The balance to be paid on the completion and acceptance of your work by Contractor and the Government Representative in charge."

The plaintiff, Birmingham Slag Company, furnished the defendant, Kidder, building materials which were used by him as such subcontractor in said Cahaba Project in the amount of $4,344.25, the last of which materials were furnished on September 28, 1938. Defendant, P. E. Kidder, was duly approved on July 12, 1938, as a subcontractor by the Farm Security Administration. The original contract was completed and accepted by the Farm Security Administration, on October 18, 1938, and on that date the defendant, W. J. Perry, paid the defendant, P. E. Kidder, $1,824.11 which was the balance remaining unpaid under said subcontract from Perry to Kidder, including extras, defendant Perry having had advanced Kidder money from time to time prior to said date.

On December 1, 1938, the plaintiff, Birmingham Slag Company, wrote the Farm Security Administration at Montgomery, Alabama, by ordinary mail, stating that it had an unpaid account against the subcontractor, P. E. Kidder, in the amount of $4,344.25 for materials furnished P. E. Kidder on the above mentioned project and inquiring whether the contractor had completed the work on said project and had received payment therefor.

On December 10, 1938, the Farm Security Administration at Montgomery, Alabama, wrote W. J. Perry at Winfield, Alabama, by ordinary mail, transmitting a copy of the letter of December 1, 1938, that had been received by it from the Birmingham Slag Company, and advising the defendant Perry that the final payment to him under his said contract would be held up by it pending receipt of affidavit from the Birmingham Slag Company that it had been paid in full, and that his attending to that matter as expeditiously as possible would be appreciated. This letter from the Farm Security Administration, with the enclosure mentioned, was received by Defendant Perry during the week of December 12, 1938. Said final payment so withheld amounted to $3,310.50, and has not yet been paid Defendant Perry. On December 10, 1938, by due mail the district Engineer of the said Farm Security Administration at Montgomery, Ala., wrote plaintiff a letter, which it received in due course, and which letter and its attachment read as follows:

"United States Department of Agriculture.

Farm Security Administration,

Montgomery, Alabama.

In Reply Refer to P5-D2-MLM.

Dec. 10, 1938

Subject: Cahaba Store and Filling Station.

Birmingham Slag Company,
2019 Sixth Avenue, North,
Birmingham, Alabama.

GENTLEMEN:

Your letter of December 1st, addressed to the Birmingham Office of this Administration, has been referred to us for handling.

You will please find attached a copy of a letter to Mr. W. J. Perry, contractor for the captioned project, who is responsible to this Administration for the construction of the store and filling station, informing him that it will be incumbent upon him to pay your account, or cause Mr. P. E. Kidder to pay same, before final payment to him on the aforementioned project will be made. We trust that you will hear from Mr. Perry or Mr. Kidder in the very near future.

Your attention is invited to that portion of the attached letter stating that this office will require an affidavit from you before final payment will be made to Mr. Perry.

Sincerely yours,

FRANKLYN H. MCGOWAN,
District Engineer."

Attachment.

"Farm Security Administration,

Montgomery, Alabama.

R5-D2-MLM.

Dec. 10, 1938.

Subject: Cahaba Store and Filling Station.

Mr. W. J. Perry,
Winfield, Alabama.

DEAR MR. PERRY:

Transmitted herewith is a copy of a letter from the Birmingham Slag Company, advising us of an unpaid account against Mr. P. E. Kidder, subcontractor for the Cahaba Store and Filling Station, in the amount of $4344.25.

Your final payment is being held up pending receipt of an affidavit from the aforementioned company to the effect that they have been paid in full. We shall appreciate your attending to this matter as expeditiously as possible.

Sincerely yours,

FRANKLYN H. McGOWAN,
District Engineer.

Attachment.

MLM-mee 12/10/38.

cc: MR. J. H. WOOD,
MR. P. E. KIDDER,
BIRMINGHAM SLAG COMPANY,
MR. MICHAEL L. MASCIA."

On December 12, 1938, the defendant Perry wrote by ordinary mail the Farm Security Administration at Montgomery, Alabama, which letter it received 12/13/38, inquiring as to why the final payment was being held up, which letter reads as follows:

"Building Service.

S. J. Perry,

Building Materials,

Phone No. 1-J,

Winfield, Alabama.

Dec. 12, 1938.

United States Dept. of Agriculture,
Farm Security Administration,
Attention, Mr. Franklin McGowan,
Montgomery, Ala.

I have not received my final check on the Trussville Project yet, am needing it very bad, so please see that this is sent me at once, i sent out to trussville yesterday to pay Gleen Merc the little account i was due them, regarding the other which seems has not paid up in full, Subcontractors, i feel sure they will take care of their obligations, your office through Mr. Garrison required that i pay all subcontractors in full taking receipts, this i done, Garrison informed me that their approved contracts, released me from being responsible for any of their accounts, so please see that my check is forwarded to me at once.

Yours very truly, W. J. PERRY."

And on the 15th of Dec., 1938, a reply to said letter was by ordinary mail sent to defendant Perry by said Farm Security Administration at Montgomery, Ala., which he received in due course of mail, and which reads as follows:

"Montgomery, Alabama Rd-D2-CLT

Dec. 15, 1938

Subject: Cahaba Store and Filling Station

Mr. W. J. Perry
Winfield, Alabama

Dear MR. PERRY:

This will acknowledge receipt of your communication dated December 12, 1938, requesting that the final payment on the captioned contract be released.

We regret to advise that it will be necessary that this office be furnished sufficient evidence that Mr. Kidder's obligation to the Birmingham Slag Company has been satisfied as outlined in our letter to you under date of December 10, 1938, before your final payment may be released. In this connection we invite your attention to Form FSA-GEN 65 in your contract, Page 14, Paragraph 35—Payments Withheld.

Sincerely yours
FRANKLY H. MCGOWAN,
District Engineer.

CLT/lw-12/14/38
583695-12/12/38"

Said paragraph 35 of said contract reads as follows:

"Paragraph 35, *Payments Withheld.*"

"The Government may withhold from any payment due the contractor so much as the Contracting Officer may determine is necessary to cover: (1) Claims of the Government, (2) claims filed against the Contractor related to the work, (3) *unpaid accounts of subcontractors or for labor and materials,* (4) any excess in prior payments made by the Government to the Contractor, and (5) injury or damage caused by acts or omissions of the Contractor, for which the Government might be liable. When such grounds are removed, the sum or sums withheld shall be included in the next monthly payment to the Contractor." (Emphasis supplied.)

Defendant W. J. Perry through the correspondence above set out acquired actual knowledge of the said claim of the beneficial plaintiff, Birmingham Slag Company, within the ninety day period from the date the last material was so furnished by it to the defendant Kidder, but at no time within ninety (90) days from the furnishing of the last material to defendant, Kidder, did the plaintiff, Birmingham Slag Company, serve upon the defendant Perry by registered mail in an envelope addressed to said W. J. Perry a

written notice stating with substantial accuracy the amount claimed and the name of the party to whom the materials were furnished, nor did it serve such notice in the manner in which the United States Marshal of this District is authorized by law to serve summons.

From the foregoing facts, the Court finds and concludes:

That the Birmingham Slag Company did not comply with Section 270 (b), Title 40, United States Code Annotated, as to giving and serving written notice upon the general contractor and defendant, W. J. Perry, and is not entitled to a recovery against the defendant, W. J. Perry, and his surety, United States Fidelity & Guaranty Company.

The Court holds as to the Plaintiff that a compliance with this Section was a condition precedent to its right to maintain this action against the general contractor and defendant, W. J. Perry, and his surety, United States Fidelity & Guaranty Company.

The Court is of the opinion that Section 270 (b), Title 40, United States Code Annotated, is unambiguous in its terms and should be construed as written.

The Court holds that the plaintiff is entitled to a judgment against the defendant, P. E. Kidder, in the amount of $4610.10 which includes the interest thereon at the legal rate from the date the last material was furnished.

A judgment will be entered in accordance with the foregoing findings and conclusions.

This the 8 day of November, 1939.

T. A. MURPHREE,
Judge of the United States District Court
For the Southern Division of the Northern District of Alabama.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 726

FLEISHER ENGINEERING & CONSTRUCTION CO. AND JOSEPH A. BASS, DOING BUSINESS AS JOSEPH A. BASS CO., ROYAL INDEMNITY COMPANY AND MARYLAND CASUALTY COMPANY, DEFENDANTS-APPELLANTS IN COURT BELOW,

Petitioners,

vs.

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF GEORGE S. HALLENBECK, DOING BUSINESS UNDER THE ASSUMED NAME AND STYLE OF HALLENBECK INSPECTION AND TESTING LABORATORY, APPELLEE IN COURT BELOW,

Plaintiff-Respondent.

BRIEF OF PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI

Abstract

The nature and basis of this action is clearly set forth in the foregoing petition (pages 3-5) and also in the opinion of Judge Hand in the Circuit Court of Appeals (R. 65-69) and does not need to be repeated.

ARGUMENT

Point I

"The statute thus creates a new liability and gives a special remedy for it, and upon well-settled principles the limitations upon such liability become a part of the right conferred and compliance with them is made essential to the assertion and benefit of the liability itself."

U. S. v. *McCord,* 233 U. S. 157, 162, 58 L. Ed. 893, 897.

The foregoing was the construction which this Court placed upon the Heard Act, which preceded the Miller Act under which this action is brought.

In accordance with that rule it was held that compliance with the requirements as to conditions precedent are jurisdictional and that if there was a failure of such compliance no action could be maintained in respect to the following matters:

1. If brought before the six months period specified in the statute, even though the event proved that the United States did not bring an action at all.

U. S. v. *McCord (supra);*

Illinois Surety Co. v. *U. S.,* 240 U. S. 214, 217, 60 L. Ed. 609, 613.

2. The action could not be maintained unless commenced before the expiration of the period of one year after performance and final settlement.

The words of the statute made this clear. The rule, general in its application, has been established by prior decisions of this Court so clearly that no new declaration on that subject was necessary.

Harrisburg v. *Richards,* 119 U. S. 199, 214, 30 L. Ed. 358.

When Congress came to enact the Miller Law, it must have had in mind the judicial construction which had been placed upon the Heard Act. It had been held that a materialman of a subcontractor was protected by the surety bond even though the general contractor had fully paid the subcontractor without any knowledge of the unpaid account of the materialman.

Hill v. *American Surety Company*, 200 U. S. 197, 50 L. Ed. 437;
Smith v. *Mosher*, 169 Fed. 430;
Mankin v. *U. S.*, 215 U. S. 533, 54 L. Ed. 315.

In many cases this created a most unjust situation compelling double payment either by the contractor or by his surety. To obviate that unjust situation Congress inserted in the Miller Act a new condition, namely that a materialman of a subcontractor should have no right of action unless notice should be given to the contractor.

To obviate all disputes as to what may, or may not, have been said at a given time the notice was required to be in writing.

The statute provided a substituted service by mail, but to obviate all disputes as to where it was sent, or when received, it required that, if that means of substitution should be adopted, it must be by registered mail so that proof could be made either by the returned receipt, or, lacking that, by the postoffice department. Experience had demonstrated clearly that the temptation to falsely assert mailing, on the one hand, or, on the other, to falsely deny receipt of the mail, was often too strong to be overcome.

The rule adopted by the court below (in spite of the plain language of the statute) to the effect that written notice received by the contractor obviated the necessity of statutory notice would nullify the statute entirely. Logically it would follow that actual knowledge however acquired would

have the same effect, leaving the whole matter of notice open to dispute and thwarting the plain legislative intent.

Point II

Under the general rules of statutory construction clearly and well established, any notice required by statute to be given must be given personally unless the statute directs some means of substituted service. In that event the substituted service provided for by the statute must be strictly followed. This statute provided for substituted service by mail but specifically provided that when mailed it must be by registered mail.

Whenever mailed in some other way than by registered mail, it is not a substitution authorized by the statute and is a nullity.

Thatcher v. *Powell,* 6 Wheat. 119, 5 L. Ed. 221;
Burck v. *Taylor,* 152 U. S. 634, 654, 38 L. Ed. 578, 585.

The leading case on this subject frequently cited and never questioned is

Rathburn v. *Acker,* 18 Barb. 393.

The decisions of the New York State courts have uniformly followed the above cited case ever since its decision.

McDermott v. *Board of Police,* 25 Barb. 635;
Re Blumberg, 149 App. Div. 303;
Steinhardt v. *Bingham,* 182 N. Y. 326, 329;
People, ex rel., v. *L. & B. R. R. Co.,* 13 Hun. 211;
Mitchell v. *Clary,* 20 Misc. 595, 597;
Boland v. *Sokolski,* 56 Misc. 333;
Re Sullivan, 31 Misc. 1, 4; affd. 53 App. Div. 637.

The lower Federal courts have also followed the rule laid down in *Rathburn* v. *Acker* (*supra*).

Haldane v. *U. S.,* 69 Fed. 819, 822;
Lyon v. *Davis,* 95 F. (2d) 103.

Also the Second Circuit, Court of Appeals, from whose decision this appeal is taken.

Re Leterman, Becher & Co., 260 Fed. 543.

The same has been the rule in many other jurisdictions. We cite some of the leading cases, but there are many others and none so far as we can find in conflict.

Reed v. *Allison*, 61 Cal. 461;
Moore v. *Bessie*, 35 Cal. 184;
Harris v. *Minn. Inv. Co.*, 89 Cal. App. 396, 265 Pac. 306;
Smith v. *Smith*, 4 Green (Iowa) 266;
Harbacheck v. *Moorland Tel. Co.*, 208 Ia. 552, 226 N. W. 171;
Allen v. *Strickland*, 100 N. C. 225, 6 S. E. 780;
Weiner v. *Commercial Cas. Co.*, 109 N. J. L. 119;
Am. Fire Ins. Co. v. *Banks*, 83 Md. 22, 34 A. 373.
People v. *Turnpike Co.*, 30 Cal. 182;
Clark v. *Adams*, 33 Mich. 159, 164.

New York cases where the notice is jurisdictional are as follows:

Reinig v. *City of Buffalo*, 102 N. Y. 308;
Curry v. *City of Buffalo*, 135 N. Y. 366;
Whitmyer v. *International Business Machine Co.*, 267 N. Y. 28;
Carson v. *Village of Dresden*, 202 N. Y. 414;
Cuccia v. *Roberts*, 204 App. Div. 653;
Ottobein v. *B. & C. Co.*, 272 N. Y. 149, 154.

It may, therefore, be stated with confidence that this rule is well established as a general proposition of law with respect to notice.

Judge Hand in his opinion in the Circuit Court of Appeals (see p. 9) said:

> "The following sentence provides how the notice is to be served but contains no language making the right of action dependent upon the mode of service."

This language cannot be sustained on any logical rule of reasoning. The statute makes the right dependent upon written notice. The portion of the statute referred to by Judge Hand defines as definitely and positively as it is possible for language to express it that service by mail shall be by registered mail, thereby simply defining how the notice shall be served. Except for that provision the general rule would apply and the service would necessarily have to be personal. Where a specific substitute for personal service is authorized no other substitute can be made available.

Point III

The authorities cited by the Circuit Court of Appeals (R. 69-70) and the District Court (R. 38 and 39) to sustain the so-called liberal construction of the Heard Law are not applicable to any of the conditions mentioned in the preceding Point II hereof.

The courts have never taken jurisdiction by means of any liberal construction of the statute. After the action has been commenced strictly in accordance with the statute, liberality of construction as to subsequent procedural matters may be invoked but not otherwise.

In the case of *U. S. for use of Bryant* v. *N. Y. Steamfitting Co., etc.*, 235 U. S. 327, 337, 59 L. Ed. 253, the court said:

> "The act of Congress is undoubtedly ambiguous. Indeed, considering the letter only of the three provisions with which we are concerned, they absolutely repel accommodation. We must try, however, to give coherence to them and accomplish the intention of Congress."

The opinion then continues to point out ambiguities and uncertainties, cites the *McCord* case *(supra)* and does not in any manner tend to attempt to overrule it.

In *Fleischmann* v. *U. S.*, 270 U. S. 349, 360, 70 L. Ed. 624, 631, the court again passed upon inconsistencies and ambiguities saying:

> "In resolving the ambiguities in its provisions the court must endeavor to give coherence to them in order to accomplish the intention of Congress, and adapt them to fulfill its whole purpose."

Both of the foregoing cases, therefore, deal with the construction of an ambiguous provision of the statute and nothing more. There is nothing in the Miller Act which is ambiguous.

In *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376, 380, 61 L. Ed. 1206, 1211, the court said:

> "In every case which has come before this court, where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed, *if the suit was brought within the period prescribed by the act.* Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this statute."

The italics are ours. We submit that states the true rule of law.

In *Vermont Marble Company* v. *National Surety Company*, 213 Fed. Rep. 429, cited in the *Bryant* case *(supra)*, it is stated at page 433 of the opinion:

> "Unquestionably, the limitation incorporated in the right to sue as conferred by the Act, upon those furnishing labor and material to the contractor, that such suit or intervention must be instituted within one year from the completion of the contract, and the provision

that only one suit can be brought, in which other creditors may intervene *are limitations upon the right of action as conferred by the statute and are jurisdictional.* They are obviously *intended for the benefit of such sureties* on the bond as are the defendants in the present case; while the last provision of the statute, requiring notice to known creditors, and publication of notice for three months and three weeks prior to the expiration of the year within which such suits are authorized to be brought, was just as obviously for the benefit of the creditor alone."

Again the italics are ours. The decision from the State of Kansas cited by the Circuit Court of Appeals at page 71 of the opinion was in accord with the foregoing and not in conflict therewith as stated.

In the *Bredlove* v. *General Baking Company,* 138 Kas. 143, the rule is declared without any argument as to informality in the mailing.

In *Weaver* v. *Shankland Walnut Company,* 131 Kas. 773, the service of the notice was irregular but it was accepted and acted upon, and it was only after such acceptance and action that the question was raised. Logically it was held to be a waiver.

In *Eckel* v. *Sinclair Refining Co.,* 133 Kas. 285, and in *Horn* v. *Elliott,* 132 Kas. 454, no question was raised, nor was there any discussion about the sufficiency of the notice.

See also the following cases sustaining our contention:

Smith Iron Works v. *Maryland Casualty Company,* 275 Mass. 74;

New Britain Lumber Co. v. *American Surety Company,* 113 Conn. 1;

Texas Co. v. *Schriewer,* 38 S. W. (2d) 141;

Southern Surety Co. v. *Jenner,* 212 Ia. 1027;

Constance v. *Leigh,* 122 Oh. St. 468;

Republic National Bank & Trust Co. v. *Massachusetts Bonding & Ins. Co.*, 68 F. (2d) 445;
Empire State Surety Co. v. *City of Des Moines*, 152 Ia. 531;
Silver v. *F. & B. Co.*, 53 Pac. (2d) 459, 40 New Mexico 33.

For the reasons above mentioned, as well as those expressed in the foregoing petition, it is respectfully urged that the prayer of the petition should be granted and that the decision of the Circuit Court of Appeals for the Second Circuit, referred to, should be reversed by this Court under writ of certiorari.

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43 Court St.,
Buffalo, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1940.

No. 15.

FLEISHER ENGINEERING & CONSTRUCTION CO., and JOSEPH A. BASS, doing business as JOSEPH A. BASS CO. *et al.*,

Appellants-Defendants in Court Below,
Petitioners,

vs.

UNITED STATES OF AMERICA for the use and Benefit of GEORGE S. HALLENBECK, doing business under the assumed name and style of HALLENBECK INSPECTION AND TESTING LABORATORY,

Plaintiff-Appellee in Court Below,
Respondent.

BRIEF ON BEHALF OF PETITIONERS IN CERTIORARI GRANTED ON REHEARING APRIL 22, 1940 (309 U. S. VII. 84 L. E. 738) TO REVIEW DECISION OF UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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BATAVIA, N. Y.

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Supreme Court of the United States

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No. 15.

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Plaintiff-Appellee in Court Below,
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BRIEF ON BEHALF OF PETITIONERS IN CERTIORARI GRANTED ON REHEARING APRIL 22, 1940 (309 U. S. VII. 84 L. E. 738) TO REVIEW DECISION OF UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT. (R. 73.)

Opinions Delivered in Courts Below.

1. Opinion of Hon. Augustus N. Hand in United States Circuit Court of Appeals, concurred in by Learned Hand and Swan, J. J. (R. 65-71). Published, 107F (2nd) 925.

2. Opinion of Hon. John Knight, D. J. in trial court. (R. 34), Published 30 F. Supp. 964.
3. Opinion of Hon. John Knight, rendered in U. S. District Court, Western District of New York, in companion case (R. 35-40), 30 F. Supp. 961.

Opinions Delivered in Other Cases in Conflict With Judgment in this Case.

1. Decision of United States Circuit Court of Appeals for the Sixth Circuit in U. S. A. for use etc. of Denie's Sons vs. Bass, *et al.*, 111 F (2nd) 965. See Exhibits C and D attached to petition for Rehearing, pages 6-11 thereof.

2. Decision of Mandelbaum, D. J. in United States District Court, Southern District of New York, in case of U. S. A. for use etc. of Morris Speckler Plumbing Supply Corporation vs. Albert Development Corporation, *et al.* Not published.

See Exhibit A attached to Petition for Certiorari, pages 11-12 thereof.

3. Decision of Murphree, D. J. in United States District Court for the Southern Division of the Northern District of Alabama. Not published. Appeal pending undetermined in U. S. Circuit Court of Appeals for the 5th Circuit.

See Exhibit B, attached to Petition for Certiorari. Pages 12-19 thereof.

Grounds of Jurisdiction.

1. The action was brought in the United States District Court for the Western District of New York under the so called Miller Act of August 24, 1935, Chap. 642, sections 1, 2, 3 and 4, 40 U. S. C. A. Sections 270 a, 270 b, 270 c and 270 d, to recover for labor and material furnished by use plaintiff, Hallenbeck, to a subcontractor in work required for construction of superstructure of Kenfield Housing Project H-6703 in Buffalo, N. Y., within said District, under a standard form of contract and government payment bond to the United States of America whereby the petitioners, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass & Co., were principals and petitioners, Maryland Casualty Company and Royal Indemnity Company were sureties. (R. 4-9.) Judgment was for plaintiff. (R. 55.)

2. On appeal to the United States Circuit Court of Appeals for the Second Circuit, the judgment of the District Court was affirmed. (R. 71 and 72.)

3. Jurisdiction of the Supreme Court to review is invoked under Judicial Code, sec. 240 (a), 28 U. S. C. A. 347, as amended by Act of February 13, 1925, c. 229, sec. 1.

Statement of the Case.

The use plaintiff, respondent here, furnished labor and material to Easthom-Melvin Co. Inc., a subcontractor of the principal obligors in the bond above mentioned, used in the performance of their contract with

the government (R. 7) for which Easthom-Melvin Co. Inc. have not made payment. (R. 22.)

The defense alleged in the separate answers of each of the petitioners is that no sufficient notice under the provisions of the Miller Act was given to the original contractors, the petitioners, Fleisher Engineering & Construction Co. and Bass. (R. 13, 17, 21 and 68.)

Interrogatories pursuant to Rule 33 of the Rules of Civil Procedure were filed and served. (R. 26-28.)

Respondent (plaintiff) filed and served answers thereto, (R. 29-31) setting forth that the written document (R. 30-31) was sent to Fleisher Engineering & Construction Co. only (R. 29, fol. 85) by ordinary mail (R. 29, fol. 86) and not by registered mail.

The document thus sent was directed not to either of the petitioners but to C. Leslie Weir, Project Engineer (R. 30, fol. 89) who represented the government. (R. 43, fol. 129.) A copy of that document was the alleged notice mailed to petitioner, Fleisher Engineering & Construction Co. (R. 43 and 44.)

The petitioners thereupon moved in the District Court for a summary judgment dismissing the complaint, which was denied (R. 33) with an opinion (R. 34), adopting an opinion in a companion case decided at the same time. (R. 35-40.) The plaintiff (respondent here) thereupon moved for a summary judgment which was granted (R. 53-54.) Judgment was entered accordingly. (R. 55.) On appeal to the United States Circuit Court of Appeals the judgment of the District

Court was affirmed by the judgment now under review before this court. (R. 71-72.) The opinion of that court per Hon. Augustus N. Hand, is in the record. (R. 65-71) and 107 F (2nd) 925.

Assigned Errors to be Urged.

All errors assigned are pertinent. (R. 56 and 57.)

1. Petitioners' (defendants') motion for summary judgment should have been granted, not denied. (R. 33.)

2. Respondent's (plaintiff's) motion for summary judgment should have been denied, not granted. (R. 53-55.)

Abstract.

The only question before this court must be determined by a construction of the Miller Act with respect to the sufficiency of notice required to be given by "any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor" in order to enable him to recover upon the contractor's payment bond.

That presents a question of law only.

The Miller Act, so far as pertinent, reads as follows:

> "Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect to which a payment bond is furnished * * * and who has not been paid in full therefor before the expiration of a period

> of ninety days after the day on which the last of the labor was done or performed by him or material furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or balance thereof, unpaid at the time of institution of such suit and to prosecute such action to final execution and judgment for the sum or sums justly due him; provided, however, that any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done and performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office, or conducts his business, or his residence, or in any manner in which the United States Marshal of the District in which the public improvement is situated is authorized by law to serve summons."
>
> Act of August 24, 1935, Chapter 642, sec. 2, 49 Stat. 794; 40 U. S. C. A. 270 b.

The right of action is created by the statute. The remedy, the jurisdiction and procedure is also prescribed in detail.

The only notice claimed and the manner of its service is described by the use plaintiff as follows:

Firstly, in his answers to interrogatories,

to the effect that the notice was directed to the project engineer for the government, a copy being

set forth (R. 29, fol. 86, R. 30, fol. 89) sent by "ordinary mail."

Secondly, in his affidavit, a little more clearly, he said:

> "That on or about the 3rd day of June, 1937, the plaintiff wrote to Mr. C. Leslie Weir, who was the project engineer representing the government, in charge of said project, as per copy of letter hereto attached and made a part of this affidavit. (R. 51-52.) That the plaintiff also mailed a copy of said letter to the defendant, Fleisher Engineering & Construction Co., by depositing said copy in a Post Office Box maintained by the United States government as a receptacle for mail in the vicinity of plaintiff's office on Pearl Street in the City of Buffalo, N. Y. on the 3rd day of June, 1937, which notice was addressed, in a postpaid wrapper, to the said defendant, Fleisher Engineering & Construction Co. at Langfield Drive. Buffalo, N. Y., and your deponent, on or about the 5th day of June, 1937, received a reply from Mr. C. Leslie Weir, as per copy of letter attached and made a part hereof." (R. Pages 43-44,52, fols. 129-130.)

This so called Miller Act is the successor to the Heard Act so called. Many of the provisions contained in the two acts are identical. So far as pertinent to the matter now under discussion the Heard Act reads as follows:

> "Sec. 270. BONDS OF CONTRACTORS FOR PUBLIC BUILDINGS OR WORKS: RIGHTS OF PERSONS FURNISHING LABOR AND MATERIALS. Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good

and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. * * * If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, * * * be, and are hereby, authorized to bring suit in the name of the United States in the district court of the United States in the district in which said contract was to be performed and executed * * * for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, That where suit is instituted by any of such creditors on the bond of the contractor, it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: And provided further, That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. * * * Provided, Further, that in all suits instituted under the provisions of this section such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition there-

to notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor."

Act of February 24, 1905, Chapter 778 as amended by the Act of March 3, 1911, Chapter 231, Sec. 291, 40 U. S. C. A. 270.

While the Heard Law contains no provision making notice an element in the creation of the right of action, nevertheless the other requirements as to time within which the suit can be brought and the time within which it cannot be brought, and the manner in which it must be brought have all been held to be matters which must be strictly followed in order to create the cause of action, and in that respect are similar in all respects to like provisions contained in the Miller Act and would require the matter of notice provided for in the Miller Act to be construed in the same way.

It is our contention that in order to enable a creditor of a subcontractor whether laborer or materialman to recover in a situation like this, he must among other things prove the following, viz:

1. That written notice was served on the general contractor by registered mail within ninety days stating certain definite things, or

2. That written notice was served on the general contractor within ninety days stating certain definite things by any method by which the United States Marshal of the District was authorized to serve summons.

3. That the aforesaid notice was given to the contractor.

This broken down means that the notice in question being statutory must be served in the way in which the statute directs it.

If served by mail (as was attempted to be done in this case), it must be served by registered mail.

The act of mailing and of registration completes the service of the notice regardless of whether the addressee actually receives the letter or not.

The court below has held that notice sent by ordinary mail was sufficient. (R. P. 68-69). The fact that the notice was directed to the "Project Engineer", an employee of the government (R. P. 30, fol. 89), instead of to the contractor was not mentioned by the court.

The history of legislation and judicial construction of the statutes on this subject may be found in a very learned and clearly written article by Edward H. Cushman published in Dickinson's Law Review, Volume XLI, No. 1, pages 1-25, October, 1936.

BRIEF OF ARGUMENT.

POINT I.

Before we proceed with our argument, it may be well to invite attention to the mischief which was caused by the Heard Act and which was sought to be rem-

edied by the Miller Act, and then to the means adopted for that purpose.

1. Under that act the laborer, or material man, whose claim was just, even undisputed, was often delayed in its enforcement for a long period of time while waiting for the final settlement of the contract to take place and for the expiration of the time thereafter granted to the government exclusively to sue on the bond and for litigation of other claims to be terminated. Two bonds were, therefore, provided for. Each laborer, or material man, can now sue, if unpaid after ninety days after the time he last furnished labor or supplied material, under the payment bond and have his rights promptly determined.

2. Under the Heard Act, the subcontractor might be paid in full, before the contractor, or his surety, became aware of the claim against the subcontractor and the contractor be compelled thereafter to pay again notwithstanding.

Hill vs. American Surety Co., 200 U. S. 197; 50 L. E. 437.
Mankin vs. U. S., 215 U. S. 533; 54 L. E. 315.
Smith vs. Mosier, 169 Fed. Rep. 430.

To prevent that injustice the Miller Act gave a right of action upon the payment bond only upon the contingency of notice. To avoid any controversy as to whether notice was sufficient, it required the notice to be "written", so that its construction would be a matter of law, thus preventing the all too frequent controversies over what was said at a given time, who said it and to whom it was said.

While the written notice can be sent by mail as a substitute for personal delivery, the mailing of it must be rendered as certain as possible. The actual receipt of it by the contractor after mailing is not essential. For that reason registration is a reasonable requirement. If the rule declared by the court below shall prevail, it will amount to the nullification of these provisions of the law. It cannot prevail except on the theory that the receipt of notice in some other way than that directed shall be sufficient. If that is true, it must follow that any actual knowledge acquired by any means by the contractor will establish liability, thus restoring all of the controversies which Congress has attempted to eliminate.

It is perfectly apparent that a claimant may testify that he mailed the notice by ordinary mail, or that he gave oral notice. The contractor may deny the oral notice or the receipt of the written notice by mail. It would prove a fruitful field of litigation over questions of fact which must often produce an unjust result. Proof of registration is easy to make. The registry receipt is practically conclusive. It reduces an uncertainty so far as humanly possible. It is not in any way an unreasonable requirement under the circumstances. The claimant is afforded an excellent security unknown to the common law without cost or expense to himself. He has all of the rights possessed prior to the enactment of the statute to deny or extend credit to his customer according to his best judgment. The act permits him, at his discretion, to shift his burden to the contractor and his surety, by a very plain and easy method prescribed in detail. To place this new and additional burden first created by the Heard Act and

unknown to the common law upon the contractor, Congress did not require (although it might have done so) that the written notice should be actually received by the contractor. The act of mailing was all that was required. Congress did require as a condition for the receipt of this very valuable and newly created right that the mailing must be such that it can be established by the ordinary registry receipt, relieving the contractor, so far as possible, from the hazards incident to false testimony of mailing and the claimant, as well, from the hazard of false testimony of non-receipt.

This is emphasized in this case because the notice was not addressed to the contractor at all but to a government employee viz. to "C. Leslie Weir, Project Engineer" (R. pages 30 and 51, fols. 89 and 152, pages 43, fol. 129). The document merely invoked the assistance of the engineer and did not in any way make any claim or demand as against the contractor.

Registered mail is regarded by the recipient as mail of more than ordinary importance. Usually, only responsible and trusted employees are authorized by the employer to open letters received by registered mail. There is little possibility that the import of letters received by registered mail will be overlooked or that letters received by registered mail will not come to the attention of persons in authority in an organization. However, the receipt by ordinary mail of a carbon copy of a letter addressed to a third party is apt to be regarded as a routine matter and its import lost. The words "registered mail" as used in the Miller Act were used advisedly.

"The giving of notice by return-receipt registered mail is far more impressive than ordinary mail, and will commend more attention. But the provisions of the statute constitute a sufficient reason for the rule of construction. Certainly it is not an unreasonable requirement, and we think courts would not be justified in saying that its requirements should not be met. The Legislature appeared to make a distinction between ordinary mail, which under ordinary circumstances is sometimes difficult to prove, and return-receipt registered mail, which provides a complete chain of proof."

Hibbler-Barnes Company against Mark K. Wilson & Company.

(Decision of the Court of Appeals of the State of Tennessee under date of June 25, 1940, not yet published but the opinion is set forth in full in the appendix to this brief. *Infra* pages 46 *et seq.* Quotation from page 58 &.)

Point II.

The cause of action alleged in the complaint is strictly statutory. It is entirely foreign in every way to anything contained in the common law. If recovery is had it must be upon the terms, conditions and contingencies set forth in the statute itself. Something which may be just as good as that prescribed will not do.

The strict construction of the procedural provisions of the Heard Act so far as jurisdictional matters are concerned has been so well and so often declared that it is no longer open to argument.

"By this statute a right of action upon the bond is created in favor of certain creditors of the contractor. The cause of action did not exist before and is the creature of the statute. The act does not place a limitation upon a cause of action theretofore existing but creates a new one upon the terms named in the statute. The right of action given to creditors is specifically conditioned upon the fact that no suit shall be brought by the United States within the six months named, for it is only in that event that the creditors shall have a right of action and may bring suit in the manner provided. The statute thus creates a new liability and gives a special remedy for it, and upon well settled principles the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself."

U. S. *ex rel.* Texas Portland Cement Co. vs. McCord, 233 U. S. 157, 162, 58 L. E. 893, 897.

Another leading case which was decided in the Eighth Circuit Court of Appeals says this:

"The statute created a new legal liability with a right to a suit for its enforcement, provided the suit was brought within one year after the performance and final settlement of the contract and not later. The time within which the suit must be brought operates as a limitation of the liability itself and not of the remedy alone. It is a condition attached to the right to sue at all. Time has been made of the essence of the right and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute and the limitation of the remedy is, therefore, to be treated as a limitation of the right."

U. S. for use of Gibson Lumber Co. vs. Boomer, 183 Fed. Rep. 726, 730.

Cited and approved:

Illinois Surety Co. vs. U. S., 240 U. S. 214, 223, 60 L. E. 609, 615.

Another case holding the same rule arose in the Third Circuit Court of Appeals and was affirmed by the United States Supreme Court.

Miller vs. American Bonding Co., 262 Fed. Rep. 103, affd. 257 U. S. 304, 307, 66 L. E. 250, 252.

Following the McCord case and the Boomer case, the Eighth Circuit Court of Appeals have said:

> "The act creates new liabilities and rights and the limitations specified are integral parts thereof. It necessarily follows that compliance therewith is essential to the assertion of the rights conferred."

Antrim Lumber Co. vs. Hannan, 18 F. (2nd) 548.

This is an application of a well established principle of law to this particular statute. The rule was well established as long ago as 1886 in an admiralty case which denied a right to recover damages by reason of death on the high seas caused by negligence. The action was brought after the expiration of the time within which it was allowed by the terms of the statute invoked. On this subject Mr. Chief Justice Waite said:

> "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania,

or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."

Steamer Harrisburg vs. Richards, 119 U. S. 199, 214, 30 L. E. 358, 362.

Further exemplification and application of the rule is found in

Middletown Nat. Bank vs. T. A. A. & N. M. Ry. Co., 197 U. S. 394, 49 L. E. 803.

Fourth National Bank vs. Francklyn, 120 U. S. 747, 30 L. E. 825.

Pollard vs. Bailey, 87 U. S. 520, 22 L. E. 376.

All of the lastly cited cases deal with the statutory liability of stockholders of a corporation for the debts of the corporation. It is stated in the Pollard case and quoted with approval in the Francklyn case, that "The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist. The statute which creates it may also declare the purposes of its creation and provide for the manner of its enforcement."

The Middletown Bank case is authority for the same rule, but expressed in language only slightly different.

The provision of such a statute cannot even be waived. Davis vs. Henderson, 266 U. S. 92, 69 L. E. 182.

In the Miller act the terms, conditions and contingencies upon which liability may be established in favor of one who has no contractual relations with the principal obligee in the bond are clearly and distinctly set forth. Among them are the following:

1. Written notice must be given to the contractor within ninety days from the date on which the claimant performed the last item of labor or furnished the last item of material.

2. "Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor. * * *"

The other methods of service provided for are not important in this case.

The court below, in its opinion recognizes that the element of notice (R. 68 and 69) is determinative of the right to recover in this case. That court then lifted from the context of the statute the single sentence "such notice shall be served by mailing the same by registered mail etc." and declared that inasmuch as the document was received "the mode of transmission becomes unimportant and the provisions as to mode of delivery should be regarded as directory and not mandatory" (R. 69). "The apparent purpose of providing for notice by 'registered mail' was" we are sure much more than to insure delivery. The more important purpose was to provide a means of service

which could be proved, or disproved, with certainty and facility. In simple fact the actual receipt of the notice is wholly unimportant because service is complete when the notice is mailed.

The Circuit Court of Appeals wrongly defines this statute as "remedial" (R. 69) *i. e.* corrective of some former imperfect right, whereas in fact it creates a new and theretofore unheard of right. Liberal construction, which would abolish a plain requirement of the act, is claimed to be within the authority of

A. Bryant Co. vs. N. Y. Steam Fitting Co., 235 U. S. 327, 387, 59 L. E. 253.

The Sixth Circuit Court of Appeals has arrived at exactly the opposite conclusion, citing and quoting from the McCord case (*supra*) as a controlling and exact authority. It is also held by that court that the Bryant case (*supra*) cited by the court below in this case "does not militate against this conclusion."

U. S. A. for use of Denie vs. Bass, 111 F. (2nd) 965, (set forth in full on pages 6 and 7 of our petition for rehearing herein).

Actual knowledge of the claim by the contractor in the Denie case was found as a fact by the court. (See Finding No. 8 on page 8 of our said petition.) The record also showed informal written notice of it. (See pages 9 and 10 of said petition.)

It is submitted that the Sixth Circuit Court of Appeals is right in its interpretation of the Bryant case as being inapplicable. Although that court rightly (as

we see it) thought that such inapplicability was self-evident, nevertheless out of respect for the learned court whose decision is now under review, we submit the following reasons which occur to us for such a ruling.

The notice to creditors under the Heard Act under consideration in the Bryant case was not a jurisdictional matter, but merely a procedural matter in a case of which the court had already acquired jurisdiction, the directions in respect to which were vague and conflicting in some parts and impossible of performance in others. The court undertook to find out the intention of Congress and then to follow it. That act made jurisdiction depend upon three distinct provisos or conditions.

1. The action must not be commenced until the expiration of the six months period within which the United States could sue.

2. The suit must be brought after that period had expired and within one year after performance and final settlement of the contract.

3. Only one action could be brought but creditors could intervene.

After the suit had been brought in accordance with these prescribed conditions the court had jurisdiction and might order notice to "known creditors" to some extent according to its discretion. The court had before it for consideration these procedural provisions with the limitation imposed upon it by the jurisdictional conditions.

The numerous ambiguities in the Heard Act are best shown in the language of the court itself, as follows:

> "The Act of Congress is undoubtedly ambiguous. Indeed, considering the letter only of the three provisos with which we are concerned, they absolutely repel accommodation. We must try, however, to give coherence to them, and accomplish the intention of Congress." * * *
>
> "By the first proviso of the act a creditor cannot institute suit until after the complete performance of the contract and its final settlement; but after such events he may do so (the United States not having sued) within one year from their fulfillment. This is clear enough. The next proviso introduces ambiguity. 'Only one action shall be brought', is its provision, in which 'any creditor may file his claim * * * and be made a party thereto *within one year from the completion of the work, and not later.*' The words in italics are disturbing. 'This right to intervene and file a claim, conferred by the statute, presupposes an action duly brought under its terms.' United States *ex rel.* Texas Portland Cement Co. vs. McCord, 233 U. S. 157, 163, 58 L. Ed. 893, 897, 34 Sup. Ct. Rep. 550. But by its terms the instituting creditor has one year from the designated events to commence his action. If he file it on the last day of the designated time, what then becomes of the rights of other creditors who must file their claim within the same limit of time, and not later? The question is not easy to answer and any answer may be disputed. It presents a puzzle for judicial resolution apparently insolvable.
>
> There is more ambiguity when we bring forward the next, and third, proviso. Notice of the suit must be given to creditors personally if they be known, and by publication besides, informing them 'of their right to intervene as the court may order.' Passing what the quoted words may mean, and coming to the requirement of notice, it is provided that it must be 'for at least three successive weeks the last publication to be at least three months before the time limited therefor.'

> This seemingly brings us to an impasse. How can the instituting creditor (so called for convenience) have a year to commence his suit and yet give the notice required—and it is to be remembered that the intervening creditor must file his claim also within a year.'' * * *
>
> ''It is urged that it is a consequence of our construction that an action may be commenced on the last day of the year, and that all opportunity for intervention may be precluded; for, counsel say, 'intervention cannot be conducted in a day,' and it would seem as if the act intended 'to afford creditors an interval of three month within which to secure an intervention.'
>
> Even if this be the consequence, some of the provisions of the act, as we have intimated, must give way. We can only select those which we consider the fittest to prevail to accomplish the purposes of the statute.''

In the construction of such an ambiguous statute the court followed the ordinary method to ascertain the legislative intent. That is all that the Bryant case means.

> Hamilton vs. Rathbone, 175 U. S. 414, 419, 44 L. E. 219, 221.

The district courts in the Southern District of New York and in the Southern Division of the Northern District of Alabama prior to the decision now under review and prior to the decision of the Denie case (*supra*) held that the provision of the statute as to service of notice by registered mail was mandatory and essential to the creation of the right of action.

> U. S. A. for use etc. of Morris Spreckler Plumbing Supply Corp. vs. Albert Development Co.

(Opinion not reported. See Exhibit A attached to our petition for certiorari, pages 11 and 12.)

U. S. A. for use etc. of Birmingham Slag Co. vs. Perry (not reported, See Exhibit B attached to our said petition, pages 12-19 appeal pending undetermined in the U. S. Circuit Court of Appeal for the 5th Circuit).

The Court of Appeals of the State of Tennessee under date of June 25, 1940, rendered a decision construing the Tennessee Statute, therein quoted, similar in principle to the proposition now before the court, though converse thereto Hibbler-Barnes Co. vs. Wilson (not yet published, but opinion set forth in full in the appendix to this brief. See *infra*, pages 46 *et seq.)*

Point III

There is no ambiguity in the Miller Act.

> "Every person who has furnished labor or material in the prosecution of the work * * * shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of the institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided*, however, that any person having * * * no contractual relationship * * * with the contractor * * * shall have a right of action upon said payment bond upon giving *written* notice. * * * Such notice shall be served by mailing the same by registered mail * * *."

No words could be plainer.

Where the words of the statute are clear, the meaning is plain and there is no other provision of the same

statute or other pertinent statute in conflict therewith, the duty of the court is to follow the language of the statute and assume that Congress meant just what it said. The Supreme Court has spoken forcibly and clearly in various situations as to the construction of different statutes. In 1889 Mr. Justice Lamar said:

> "We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error. Why not assume that the framers of the Constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case there is a well settled rule which we must observe. The object of construction, applied to a Constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitution provision is not ambiguous the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.
>
> To get at the thought or meaning expressed in a statute, a contract or a Constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it. (Newell vs. People, 7 N. Y. 9; Hills vs. Chicago, 60 Ill. 86; Denn vs. Reid, 35 U. S. 10 Pet. 524 (9 L. E. 519); Leonard vs. Wiseman, 31 Md. 204; People vs. Potter, 47 N. Y. 375; Cooley, Const. Lim. p. 57; Story, Const. sec. 400, Vol. I, p. 305; Beardstown v. Virginia, 76 Ill. 34). So, also, where a law is expressed in plain and unambiguous terms whether those terms are general or limited,

the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. (United States vs. Fisher, 6 U. S. 2, Cranch, 358, 399 (2 L. E. 304; 317); Doggett vs. Florida R. R. Co., 99 U. S. 72 (25 L. E. 301))."

Board of Lake Co. Commissioners vs. Rollins, 130 U. S. 662, 32 L. E. 1060, 1063.

"We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall if possible be accorded to every word."

Washington Market Company vs. Hoffman, 101 U. S. 112; 25 L. E. 782.

The opinion in the last mentioned case was written by Mr. Justice Strong and immediately following the foregoing quotation he quoted from Bacon's Abridgement, sec. 2 as follows:

"'A statute ought upon the law to be so construed that, if it can be prevented, no clause, sentence, or words shall be superfluous, void or insignificant.' This rule has been repeated innumerable times."

In 1914 Mr. Justice Day in obedience to the foregoing authorities refused to eliminate any of the words contained in subdivision 5 of section 7 of the Act of June 30, 1906, known as the Pure Food and Drugs Act, which provided that food should be deemed to be adulterated if it contained any "added poisonous or other added deleterious ingredient *which may render such article injurious to health.*"

The italicized words were held to be clearly expressive of the meaning of Congress and could not be eliminated.

U. S. vs. Lexington Mill & Elevator Company,
232 U. S. 399, 410; 58 L. E. 658, 662.

As late as 1930 Mr. Justice Sutherland summed up the law on the subject in the following language:

> "Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. (Monson vs. Chester, 22 Pick, 385, 387.) It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker, himself, turn out to be mischievous, absurd, or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts," citing many authorities.
>
> Crooks vs. Harrelson, 282 U. S. 55, 60; 75 L. E. 156, 175.

Congress, therefore, meant that the right of action could only be created by notice, that the notice must be written and that if sent by mail it must be registered mail. Any other notice, or knowledge gained by any other means whatsoever, was no notice at all.

The court below recognized that this right of action was contingent upon notice, (R. 68), but that if the document was received by mail the requirement for registration was unimportant.

It is difficult to understand why registration is not an integral part of the condition. If one can dispense with registration he can dispense with any other requirement such as prepayment of postage, enclosing in an envelope, or even addressing the envelope to the correct address. If all of these directions as to service had been incorporated into the preceding sentence, it would have been long, involved and perhaps difficult to understand. The two sentences are definitely connected because the second sentence refers to "such notice", meaning the notice referred to in the previous sentence. It constitutes a definition of the written notice. Any other kind of written notice sent in some other way is not notice, because it differs from the definition of the substitute for personal service of notification authorized by Congress. This is emphatically true because, as we have shown, service is completed by mailing and not by delivery of the matter mailed by the postoffice.

The decision under review violates another well established rule of statutory construction, to wit: "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."

The Raleigh & Gaston R. R. Co. vs. Reid, 80 U. S. 269; 20 L. E. 570.

Botany Worsted Mills vs. U. S., 278 U. S. 282, 289; 73 L. E. 379, 385.

Paso Robles Merc. Co. vs. Commissioners of Internal Revenue, 33 F. (2nd) 653, 654.

Direction to serve by "registered mail" was equivalent to a specific denial of right to serve by "ordinary mail."

As to notice in general see *Infra,* Point IV.

If, however, it shall be found that the words contained in the statute on the subject of notice and the manner of its service are doubtful in any way, under well settled principles, it should be determined that the words are mandatory and not merely directory, because upon those questions depend matters of public interest and the rights of third parties, namely the contractors and their sureties. "The recognized rule is that when the act to be done concerns the public interest or the rights of third persons, even permissive words in the statute will be construed as mandatory."

People *ex rel.* Cayuga Nation vs. Land Commissioners, 207 N. Y. 42;

Vulcan Rail & Construction Co. Inc. vs. Co. of Westchester, 250 App. Div. 212, 220.

"There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in this regard of the requisitions ineffectual. Such generally are requisitions designed to secure order, system, and despatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated, but when the requisitions prescribed are intended for the protection of the citizen and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid."

French vs. Edwards, 13 Wall. 506, 20 L. E. 702.

This question was directly presented and distinctly settled in the case of French vs. Edwards *(supra)*.

Lyon vs. Alley, 130 U. S. 177, 32 L. E. 899.

In the case of Vulcan Rail & Construction Co. vs. Co. of Westchester, *(supra)*, the court construed a provision of the New York State Lien Law on the subject of assignment of lien which reads as follows: "Every assignment of moneys or any part thereof due or to become due under a contract for public improvement shall contain a covenant by the assignor that he will receive any moneys advanced thereunder by the assignee as a trust fund", for certain uses and purposes defined.

N. Y. State Lien Law, sec. 25 (5).

An assignment had been executed which did not contain those provisions. It was held that the assignor by reason thereof was not protected in priority payment.

Since the foregoing was written a decision has been rendered by the Tennessee Court of Appeals under date of June 25, 1940.

Hibbler-Barnes Company vs. Mark K. Wilson & Company, (See appendix for opinion).

The Tennessee statute involved in that case is set forth in full in the opinion. *(Infra* page 48). It will be observed that the proposition there before the court is the converse of that involved in the case at bar, but the construction thereof made by the court and the reasons assigned therefor are exactly pertinent as

we see it. It will be observed that under the statute of Tennessee the contractor who furnishes the payment bond is liable to a laborer or materialman until he "gives a notice in writing by return-registered mail to any laborer or furnisher of material * * * that he will not be responsible therefor. * * *"

In the case at bar the liability is created by such a notice sent by registered mail. In principle the two situations are the same. The Tennessee court held that a notice in writing which otherwise might be sufficient did not operate to relieve the contractor from liability because it was sent forward by ordinary mail and not by "return-receipt-registered mail" notwithstanding the fact that the written notice thus sent by ordinary mail was actual and in fact received by the addressee.

Point IV.

Law as to Notice in General.

It has been long established in various state courts that where notification is required it must be actual and personal unless there is some specific statutory direction for a substitute.

20 Ruling Case Law, Sec. 4, p. 343 *et seq.*
Rathburn vs. Acker, 18 Barb. 393;
McDermott vs. Board of Police, 25 Barb. 635;
Mitchell vs. Clary, 20 Misc. 595, 646;
People *ex rel.* vs. L. & B. R. R. Co., 13 Hun. 211;
Boland vs. Sokolski, 56 Misc. 333;
Re Blumberg, 149 App. Div. 303;

Re Sullivan, 31 Misc. 1, 4; affd. 53 App. Div. 637;
Steinhardt vs. Bingham, 182 N. Y. 326, 328;
Beakes vs. DaCunha, 126 N. Y. 293;
Reed vs. Allison, 61 Cal. 461;
Moore vs. Bessie, 35 Cal. 184;
Harris vs. Minn. Inv. Co., 265 P. 306, 89 Cal. A. 396;
Smith vs. Smith, 4 Green (Iowa) 266;
Harbacheck vs. Moorland Tel. Co., 208 Ia. 552, 226 N. W. 171;
Allen vs. Strickland, 100 N. C. 225, 6 S. E. 780;
Werner vs. Commercial Cas. Co., 109 N. J. L. 119, 160 A. 547;
Am. Fire Ins. Co. vs. Banks, 83 Md. 22, 34 A. 373;
State vs. Second Judicial District Court, 38 Mont. 119, 99 P. 139;
People vs. Turnpike Co., 30 Cal. 182;
Clark vs. Adams, 33 Mich. 159.

The foregoing numerous cases are all to the same effect. The leading case most frequently cited in the others is Rathburn vs. Acker *(supra)*. The Federal courts have accepted the rule as well established.

Ex parte Caplis, 275 Fed. Rep. 980;
Lyon vs. Davis, 95 F (2nd) 103;
Haldane vs. U. S., 69 Fed. Rep. 819, 822;
In re Leterman Becher & Co., (C. C. A. 2nd Cir.), 260 Fed. Rep. 543.

The court has deemed the rule to be so well established that it has been stated without the citation of authorities to sustain it, saying:

"If notice was essential to charge them, actual notice should have been given, at least in the absence of a statute providing some means for constructive notice."

Burck vs. Taylor, 152 U. S. 634, 654, 38 L. E. 578, 585.

Point V.

Where a statute creates a cause of action in derogation of common right and prescribes a substituted service of notice, that substituted service must be exactly complied with in order to give jurisdiction. Such statutes are construed *strictissimi juris.*

"The manner and mode of service depends, of course, upon the character of the proceeding, as well as the statute by which the same is regulated. In general, however, where the notice is required by statute or rule of court, and the method of serving the same is not laid down, it is understood that there shall be personal service. And where the statutory proceeding is one in derogation of common right, as the involuntary sale of the property of an individual, the statute must be strictly construed and closely pursued."

Wade on the Law of Notice, 2nd Ed., sec. 1334, p. 664.

Service by mail is a substitute for personal notification. In the absence of the statute it would be wholly ineffectual, a mere gesture. Being statutory, it is just as important that the substituted service be in the exact manner prescribed as it is that it be within the time prescribed.

1 C. J. S. sec. 27, p. 1068, 1069;

Thatcher vs. Powell, 6 Wheat. 119, 5 L. E. 221.

The statute having provided a specific substitute for personal service of notice, in order to make that substituted service effective, it is necessary that everything prescribed in the statute be fully, exactly and completely performed, otherwise it is a different substitute from that authorized and constitutes a failure to serve at all.

25 Ruling Case Law, 982;
59 C. J. 984;
Hibbler-Barnes Co. vs. Wilson (see appendix).

The substitute in this case being by registered mail, the registration is a necessary part of that substituted service and until the communication is mailed and *registered*, the service is not completed.

20 Ruling Case Law, sec. 20, p. 356.
Ross vs. Hawkeye Ins. Co., 93 Ia. 222;
Schilling vs. Odiebak, 177 Minn. 90.

In addition to this, as we have shown in preceding Point III hereof, at the end of it, the specification of "registration" of the communication when mailed is equivalent to "the negative of any other mode" of mailing, just as effectually as if it had been expressed in specific words.

Point VI.

This rule of strict construction has been complied with, we believe, without exception in many cases of state and federal statutes of different nature from the one under consideration, where the right is made to depend upon a notice. It would extend this brief to altogether too large dimensions to attempt to cite all

such cases. We mention the following, however, as examples:

The New York State Employers' Liability Act, known as Section 201 of Chapter 31 of the Consolidated Laws, entitled Labor Law as amended by Chapter 352 of the Laws of 1910, though since repealed, was in full force in 1914, and so far as pertinent to the question here involved provided:

> "No action for recovery of compensation for injury or death under this article shall be maintained unless notice of the time, place and cause of the injury is given to the employer within one hundred and twenty days and the action is commenced within one year after the occurrence of the accident, causing the injury or death * * * The notice or demand may be served by post by letter addressed to the person on whom it is to be served at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post. When the employer is a corporation, notice shall be served by delivering the same or by sending it by post addressed to the office or principal place of business of such corporation."

An action came before the Second Circuit Court of Appeals to recover under that law, in which a notice though in writing and sent by post was sent to the wrong address, namely to a branch office of the employer. The opinion of the court was written by Judge Ward, concurred in by Circuit Judges Lacombe and Rogers. In the course of the opinion it was pointed out that this Act:

> "Increases the common law liability of the master and that it makes conformity with its provisions

a condition precedent to the servant's right of action.

Next it is to be noted that actual knowledge by the master of everything prescribed by the act is immaterial. The legislature must, of course, have been aware that generally speaking the master knows all about such occurrences. Proof of this fact or even proof that the fullest information had been given verbally would amount to nothing. The notice must be given in writing. * * * We think the provision of the act must be strictly observed."

It was then pointed out that the principal place of business of the employer was Cornwall, Orange County, N. Y. The notice was directed to the defendant at Van Cortland Park, N. Y. where it had a branch office. The court said:

"Similarly notice not mailed in accordance with the section, though received, is not notice within the meaning of the act."

Mason & Hanger Co. vs. Sharon, 219 Fed. Rep. 526.

Judge Hand in his opinion found it impossible to distinguish this case in principle but contented himself with a refusal to follow it. (R. 70.)

The Workmen's Compensation Law of the State of Kansas provides:

"No proceedings for compensation shall be maintainable hereunder unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such claim to him by registered mail."

Laws of Kansas for 1927, Chapter 232, sec. 20.

The Supreme Court of Kansas in construing that statute said:

> "The fact that the statute prescribes the delivery of the written claim by registered mail as one of the ways of serving it might very properly and fairly come under the very general rule that it was the intention of the legislature to exclude all other ways of doing it by mail. If not, why designate registered mail? * * * The term 'shall be served' calls for a consideration as well as the term 'to be delivered'. Not everything that comes into one's possession by mail or otherwise can be said to be served upon him. The legislature in using these terms necessarily meant something more formal than what might happen to come to an employer by mail, and, therefore, with an apparently good reason for making a distinction limited such service so far as being done by mail to registered mail."
>
> Breedlove vs. General Baking Company, 138 Kans. 143;
>
> Klein vs. McCullough, 135 Kans. 593.

The other cases from Kansas cited by the Circuit Court of Appeals in this case (R. 69) and by Judge Knight in the District Court (R. 39) are easily distinguishable to such an extent that they are not authorities.

In Weaver vs. Shankland Walnut Company, 131 Kans. 771, the service was irregular but the insurance carrier acted upon it, made payments under it, thereby waiving all irregularities in the service.

The question as to the manner of service of the notice was not raised or discussed in either of the following cases:

Eckl vs. Sinclair Refining Co., 133 Kans., 285; Honn vs. Elliott, 132 Kans. 454.

The Circuit Court of Appeals for the Eighth Circuit in 1903 passed upon a Colorado statute of similar import. That statute provided that an employer should be liable to an employee for personal injuries "by reason of the negligence of any person in the service of the employer who has charge or control of any switch, signal, locomotive engine or train upon a railroad."

Colorado Session Laws 1893, page 129, c. 77.

The act further provided that "no action for the recovery of compensation for injury or death under this act shall be maintained unless written notice of the time, place and cause of the injury is given to the employer within sixty days after the occurrence of the accident. * * *"

Laws of the State of Colorado, 1893, Page 129, c. 77, sec. 2.

At the end of the opinion the court said:

> "Upon the record the failure of Lange to give the notice required by the Act of 1893 is admitted. Such failure is fatal to his case. The enforcement of the liability of the company was by the act which created it conditioned upon the giving of the notice. Without compliance with the condition there can be no enforcement of the liability."

Lange vs. Union Pacific R. Co., 126 Fed. Rep. 338, 342.

In another action in the Circuit Court of Appeals for the Eighth Circuit, it became necessary to con-

strue the federal revenue act of 1926, which provided "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously assessed or collected * * * until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue * * *."

Revenue Act of 1926, c. 27; 26 USCA 1672-1673.

In that case no claim for refund had been filed. It was held that the filing of the claim was clearly a prerequisite to the action in court for the recovery of the tax and that, therefore, the action could not be maintained, citing many cases decided in the Supreme Court to sustain the proposition.

Lucky Tiger—Combination Gold Mining Co. vs. Crooks, 95 F (2nd) 885, 888.

In Massachusetts there is a statutory requirement that a sworn statement of claim must be filed with the County Treasurer or with the City or Town Clerk in order to permit a recovery. It has been held that an oral request made to the town counsel to bring suit against the surety was not a compliance with the law.

Smith Iron Works vs. Maryland Casualty Company, 279 Mass. 74.

In Connecticut a similar statute has been construed in the same way.

New Britain Lumber Co. vs. American Surety Company, 113 Conn. 1.

To further illustrate the rule and the universality of its application reference may be had to the following cases:

Texas Co. vs. Schriewer, 38 S. W. (2nd) 141;
Southern Surety Co. vs. Jenner, 212 Ia. 1027;
Constance vs. Lay, 122 Oh. St. 468;
Republic National Bank & Trust Co. vs. Massachusetts Bonding & Ins. Co., 68 F (2nd) 445;
Empire State Surety Co. vs. City of Des Moines, 152 Ia. 531;
Silver vs. F & D Co., 53 Pac. (2nd) 459 40 N. M. 33.

Construction of City and Village Charters.

Other instances where rights of action are dependent upon previous notice or some similar proceeding have arisen under various city charters in the State of New York, and we believe elsewhere, where provision is contained, as was in 1886 contained in the Buffalo City charter, to the effect "that no action or proceeding to recover or enforce any claim against the city shall be brought until the expiration of forty days after the claim shall have been presented to the common council."

Laws of 1870, Chapter 519, sec. 7, title 3.

Under this statute it was held clearly that presentation of the claim in the way provided for in the statute was a condition precedent to the right to commence any action and no recovery could be had in the absence thereof.

Reining vs. City of Buffalo, 102 N. Y. 308.

In the State of New York, it is now provided in Chapter 53 of the Consolidated Laws, sec. 44, that

in order to recover in a civil action no liability shall be asserted against the city "unless a claim therefor in writing, verified by the oath of the claimant, shall be presented" as in the act required. In a case where the affidavit of verification was not signed by the affiant, the court held that it was improperly verified and that no action could be brought by reason of the fact of that irregularity in the claim. The verification not being in the form required by the statute was no verification at all.

Ponsrok vs. City of Yonkers, 254 N. Y. 91.

In a similar situation under the same statute where the verification was not signed by the affiant, no right of action was created.

Rockwell vs. City of Syracuse, 257 App. Div. 92.

Under the village charter of the Village of Port Chester, Laws of 1868, Chapter 818 as amended by the Laws of 1894, Chapter 23, Title 7, section 16, is a similar provision quoted in full in the opinion of the case about to be cited. In that statute it will be observed that the claim is required to be presented to the president or treasurer of the village. The claim was presented to the village clerk. Recovery was not allowed upon any theory that the village officers had full knowledge of the whole transaction.

Rogers vs. Village of Port Chester, 234 N. Y. 182.

A similar rule has been applied to the charter provisions of New York City.

Lewis vs. City of New York, 278 N. Y. 517.

Mechanic's Lien Cases.

In statutes authorizing mechanic's liens the same construction has been followed in all cases so far as we can find.

New York State Statute on the subject of mechanic's liens, section 9 of the Lien Law, provides for the acquirement of a mechanic's lien when he shall have filed a notice containing certain facts, and then provides "The notice must be verified by the lienor or his agent to the effect that the statements therein contained are true to his knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true."

New York State Lien Law, section 9.

A case arose in which the notice of lien instead of being verified as commanded by the statute had attached to it a corporate acknowledgment. It was held that the lack of verification by the affidavit of the person verifying it was fatal.

Re Passero & Sons Inc., 237 App. Div. 638;
Dwelle Kaiser Co. vs. Frid, 233 App. Div. 427, 433.

In many other states besides New York similar lien laws have been construed in the same way, always so far as we can find to the effect that notice of the lien must be strictly in accordance with the statute authorizing the lien and served strictly in accordance with the directions for service found in the same statutes.

Nanz vs. Park & Company, 103 Tenn. 299.

The person claiming the benefit of the lien must always strictly bring himself within the provisions of the act. No liberality of construction will dispense with any of the requirements in that respect.

Thompson vs. Baxter, 8 Pick (92 Tenn.) 305.

In many states statutes have been adopted providing for substituted service upon nonresidents involved in an automobile accident within the state. An instance of such statutes is this:

> "The operation by a nonresident of a motor vehicle or motorcycle on the highway in this state shall be deemed equivalent to an appointment by such nonresident of the Secretary of state to be his true and lawful attorney, upon whom may be served the summons in any action against him growing out of any accident or collision in which such nonresident may be involved while operating a motor vehicle on such a public highway; and such operation shall be deemed a signification of his agreement that any such summons against him which is so served shall be of the same legal force and effect as if served on him personally within the state. Service of such summons shall be made by leaving a copy thereof with a fee of $2.00 with the Secretary of state or in his office, and such service shall be sufficient service upon such nonresident provided that notice of such service and a copy of the summons are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt, the plaintiff's affidavit of compliance therewith, and a copy of the summons and complaint are filed with the clerk of the court in which the action is pending."
>
> New York State Vehicle & Traffic Law, sec. 52.

Although the statute has now been amended, while it was in force as above written in 1931, it was held

that the requirements were that "the defendant's return receipt" be filed with the accompanying affidavit was essential to constitute legal substituted service.

Dwyer vs. Shalek, 232 App. Div. 780, 781.

The defect in that service was that the defendant refused to accept the papers from the postoffice or to sign the return receipt.

Point VII.

The alleged notice did not comply with the terms of the statute and is, therefore, a nullity.

The statute provides that a person in the situation of the use plaintiff "shall have a right of action upon the said payment bond upon giving notice to the said contractor". Then follow provisions upon the manner in which the notice shall be given.

Interrogatory No. 7 and Interrogatory No. 8 required the production of the written notice and a statement of the manner of its service (R. 27, fols. 80 and 81). Answers to those interrogatories specified that the notice was in writing, (R. 29, fol. 86) and a copy was attached. (R. 30 and 31.) Eliminating all other questions about the sufficiency of the notice, we find that it is addressed not to either of the principals in the bond, that is the contractors, but to one C. Leslie Weir, Project Engineer. (R. 30, fol. 89.) It is respectfully submitted that this was not notice to the contractors within the meaning of the Miller Act. It was a primary communication to the Project Engineer. The contractors before they would be charged with

notice must have one directed to them either in fact or in substance. This was neither. It did not purport to call anything to the attention of the contractors or make any demand upon the contractors, but simply invokes the best efforts of the Project Engineer to bring about payment of the money to the claimant from some source or other. The receipt of such a document, no matter how delivered, by the contractor might reasonably have been construed to be a courtesy copy and nothing more. The affidavit of Mr. Hallenbeck, submitted to the District Court upon his application for a summary judgment, is to the same effect as the answer to the interrogatories hereinbefore mentioned, except that it points out specifically that Mr. Weir was, as he purports to be, a representative of the government and not of the contractor. (R. 43, fol. 129.) The affidavit also sets out a little more in detail the manner in which the document was mailed. (R. 43 and 44.) The statement attached to the affidavit (R. 45-51) does not purport to have been furnished to the contractor but is merely a full statement of what might reasonably have been included in the notice if it had been intended to be a notice to the contractor. The carbon copy of the letter to the Project Engineer referred to in the affidavit and attached is the same as is attached to the interrogatories. (R. 43, 51 and 52.) No specific mention of this defect in the notice is pointed out in the opinion either of Judge Knight in the District Court (R. 36) or in the opinion of the Circuit Court of Appeals (R. 68). Judge Knight says "The notice itself consists of a letter directed to Fleisher Engineering & Construction Company." (R. 36.) This is not strictly correct because the letter is not directed to that company. While it is perfectly plain that the

statute intended the contents of this written notice addressed to the contractor to be quite informal, nevertheless a copy of a letter directed to some third person passes beyond the mere matter of informality and creates a deficiency in substance.

It is respectfully submitted, therefore, that the judgments of the Circuit Court of Appeals and of the District Court should be reversed, and that the defendant's motion for a summary judgment, dismissing the complaint for the foregoing reasons, should be granted.

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APPENDIX.

TENNESSEE COURT OF APPEALS
EASTERN SECTION.

Decided June 25, 1940.

HIBBLER-BARNES COMPANY,
v.
MARK K. WILSON COMPANY, *et al.*

Hamilton County Equity. Hon. J. L. Foust, Chancellor.

Attorneys for Appellant: Wilkerson & Wilkerson, Chattanooga.

Attorneys for Appellees: Shepherd, Curry & Levine, Chattanooga.

The defendant, Mark K. Wilson Company, had the general contract to construct a school building at Soddy, Tennessee for use as an elementary school building. The Mark K. Wilson Company sub-let the job for plastering the building to the defendant Louis W. Vetter. Hibbler-Barnes Company furnished materials for the plastering job to said Louis W. Vetter in the amount of $817.38. The complainant filed its original bill in this cause against the Mark K. Wilson Company, the general contractor, Trinity Universal Insurance Company as surety on the bond of said Mark K. Wilson Company to guarantee payment for materials used in the construction of said building, and against Louis W. Vetter, sub-contractor, to collect for same.

Louis W. Vetter made no defense to the suit and final judgment was entered against him. He is not a

party to the appeal to this court. Mark K. Wilson Company and the Insurance Company resisted liability on the claim, interposing as a defense to same a letter written by the Mark K. Wilson Company to Hibbler-Barnes Company on May 19, 1939, the material portions of which follow:

> "Replying to yours of May 18th, with reference to material for Louis Vetter.
>
> We will be glad to receive duplicate invoices and pay part on account as the work progresses but cannot pay them in full or be responsible for them in full because we are having to advance pay-rolls to Mr. Vetter on this work.
>
> We will, however, at the completion of the job, make check to Vetter and yourselves for whatever balance there may be due him."

This letter was forwarded by ordinary mail and was received by Hibbler-Barnes Company on May 20th, 1939. At the time this letter was received materials in the amount of $232.80 had already been furnished, and thereafter materials amounting to the sum of $584.58 were furnished. The Chancellor allowed a recovery for the materials furnished prior to the receipt of this letter, and denied a recovery for all materials furnished thereafter. The complainant has appealed to this court from the decree so entered and has assigned errors to the action of the Chancellor in denying a recovery for all materials furnished.

There are no controverted facts in the case. The amount of the materials furnished is not in dispute. And only legal questions are involved. The first is the sufficiency of the letter in question as notice that the defendant would not be responsible for materials furnished to the sub-contractor, and second, whether or

not the mailing of the letter in the regular mail order, but not by return-receipt registered mail, is a sufficient compliance with the provisions of the statute to avoid liability. The statute upon which complainant relies, being Section 7955 of the Tennessee Code of 1932, is as follows:

> "No contract shall be let for any public work in this state, by any city, county or state authority, until the contractor shall have first executed a good and solvent bond to the effect that he will pay for all the labor and materials used by said contractor, or any immediate or remote sub-contractor under him, in said contract, in lawful money of the United States." * * * "In the event the contractor who has executed the bond gives notice, in writing, by return-receipt registered mail, to any laborer or furnisher of material or to any such immediate or remote sub-contractor, that he will not be responsible therefor, then such person who thereafter furnishes such material or labor shall not secure advantage of the provisions of this section, for materials furnished or labor done after the receipt of such notice."

As above set out the defendant sent the letter in question by ordinary mail, and not by return-receipt registered mail. The Chancellor was of opinion that the provisions of the statute with regard to the manner of giving the notice was directory, and that a substantial compliance with the provisions of same was all that was required. He found that the mailing of the letter by ordinary mail was actually received by complainant; that this constituted a substantial compliance with the provisions of the statute and was sufficient. This conclusion is challenged by appropriate assignment of errors.

So far as we have been able to find the provisions of with respect to the method of giving the notice have never been passed upon by the appellate courts of this state. However, the general rule in this connection as stated by Ruling Case Law is that, "Where a specific mode of giving notice is prescribed by statute that method is exclusive."

20 R. C. L., page 343, Sec. 4.

This statement of the rule has been approved by the Supreme Court of Tennessee in connection with the giving of notice of non-payment of checks, in construing requirement for notice to municipalities of accidents and to employers in compensation cases.

Payne v. State, 158 Tenn., 211.
White v. Nashville, 134 Tenn. 695.
City of Knoxville v. Fielding, 153 Tenn., 586.
Beech v. Keicher, 154 Tenn., 329.

The provisions of the statute are clear to the effect that no contract is to be let for any public work in this state by any city, county or state authority, until the contractor has first executed a good and solvent bond to the effect that he will pay for all the labor and materials used by himself, or any immediate or remote sub-contractor under him. The execution of the bond for insuring payment for materials furnished and labor performed is a condition precedent to the making of the contract between the contractor and the city, county or state agency. By the very terms of the undertaking in this case the defendant became obligated to pay to the complainant the value of the materials used by the sub-contractor which are sued for. It is insisted that this liability may be avoided by the

giving of actual notice without a strict compliance with the provisions of the statute. In other words it is insisted that the general rule applicable to the giving of notice prescribed by statute is not applicable to the provisions of the statute in question, but that the provisions of the statute have been met by the giving of actual notice. This insistence is based on the insistence that the method of giving the notice is directory and not mandatory, and that substantial compliance is all that is required to comply with directory provisions of a statute.

But we are cited to no authority where it has been held that a provision such as that involved here has been declared to be directory and not mandatory. In the absence of such authority we are inclined to follow the general rule. The legislative intent is the cardinal rule in the construction of statutes, and the intent is to be followed in construing statutes in the absence of some ambiguity or other impediment. In this particular statute the Legislature provided in no uncertain terms the method of giving the notice of non-liability. If it is to be held that the giving of notice by ordinary mail was sufficient compliance with the provisions of the statute, the effect of such holding would be that the giving of actual notice was all that is necessary. We think that this was not the intention of the Legislature. The giving of notice by return-receipt registered mail is far more impressive than ordinary mail, and will commend more attention. But the provisions of the statute constitute a sufficient reason for the rule of construction. Certainly it is not an unreasonable requirement, and we think courts would not be justified in saying that its requirements should

not be met. The Legislature appeared to make a distinction between ordinary mail, which under ordinary circumstances is sometimes difficult to prove, and return-receipt registered mail, which provides a complete chain of proof.

We think the letter written by the defendant failed to meet the requirements of the statute as to the giving of notice, and that the Chancellor was in error in so holding. We think the method of giving notice provided by the statute was exclusive, and that the letter in question by ordinary mail was not sufficient. There is some question as to the sufficiency of the content of the letter to put complainant upon notice that defendant intended to deny liability for the materials furnished. However, having reached the conclusion that the notice as given failed to satisfy the requirements of the statute in any event, it is not necessary to pass upon this question.

For the reasons stated the decree of the Chancellor will be reversed and a decree will be entered in this court for the full amount of $817.38 with interest thereon from September 30th, 1939, in the amount of $36.30, or a total of $853.68, against Mark K. Wilson Company, and Trinity Universal Insurance Company.

AILOR,
Judge.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 15.

FLEISHER ENGINEERING & CONSTRUCTION CO. and JOSEPH A. BASS, doing business as Joseph A. Bass Co. *et al.*,

Petitioners,

VS.

UNITED STATES OF AMERICA for use and benefit of George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspection and Testing Laboratory,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONERS IN CERTIORARI.

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BATAVIA, N. Y.

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Statement.

The respondent, if we understand him correctly, seeks to sustain the judgments under review only upon a theory of "liberal construction" of the Miller Act.

It is our contention that relief which he asks for can be granted only by act of Congress and not by judicial construction of the statute.

POINT I.

The Miller Act is in no sense of the word a remedial statute. On the contrary it creates a new cause of action and a new liability entirely unknown to the common law. Such statutes so far as jurisdiction is concerned must always be strictly construed. (See Point II, pages 14-22 of our principal brief.)

The Miller Act does not purport to amend the Heard Act. That statute was entirely repealed. Instead thereof the Miller Act was enacted, differing in many essential points from the Heard Act, among which differences are the following:

The bond required in the Heard Act is changed into two bonds.

One is a performance bond in which the government alone is interested. The other is a payment bond in which the creditors alone are interested.

Instead of a single action for the benefit of the government and all creditors, each creditor may maintain a separate action for his own benefit, in which no other creditor can intervene.

The Miller Act does not require a period of six months for the government to act before a creditor can do so, but the creditor himself can bring an action within the statutory period after his own cause of action accrues.

In both, suits are made dependent upon certain conditions. The right of the creditor under both statutes

is limited in time to a definite period "from the completion and final settlement of the contract."

The Miller Act has added a further condition applicable only to creditors of subcontractors making their right of action dependent upon notice required to be given in a very specific and definite manner. The Miller Act is, therefore, strictly an act in derogation of the common law.

POINT II.

The liberality of construction of the Heard Act never applied to matters of jurisdiction.

Before any laborer or materialman under the Heard Act, and equally under the Miller Act, can obtain any benefits under the statute he must comply with all of the preliminary statutory requirements. Under the Heard Act "the suit" must be "brought within the period prescribed by the act."

> Illinois Surety Company vs. Davis, 244 U. S. 376, 380, (cited on pages 17 and 18 of the respondent's brief).

Under the Miller Act the requirement for notice in a proper case and the manner in which it shall be given is just as definitely a condition precedent to the right to sue as is the other.

After full compliance with jurisdictional requirements liberality with respect to strictly procedural matters thereafter is quite properly admitted, but not otherwise.

POINT III.

Answering Point II (pages 8-11) of the respondent's brief. See Point III (pages 23-30) of petitioner's brief.

There is no ambiguity pointed out in the Miller Act. We submit that none exists.

The respondent has lifted from the context certain sentences and expressions found in various cases without any reference to the subject under consideration, or of the pertinency of the quotations to the subject intended to be decided by the court. With respect to these decisions we respectfully submit the following supplementing what is found in the respondent's brief.

1. Surace vs. Danna, *et al.*, 248 N. Y. 18, construes the provisions of the New York State Workmen's Compensation Law, section 33, reading as follows:

> "Compensation or benefits due under this statute shall not be assigned, released, or commuted except as provided by this chapter and shall be exempt from all claims of creditors and from levy, execution and attachment, or other remedy for recovery or collection of a debt, which exemption may not be waived."

The employee in that case had been awarded $3500.00 under the act for injuries suffered in the course of his employment. He had received the money and deposited it in a bank. One of his creditors attempted to levy upon it, claiming that the exemption from levy only applied to benefits due and unpaid, and that as

soon as the benefits were paid the exemptions ceased. The court construed the act to mean that the exemption continued after payment over as well as before, pointing out that it would be a strained construction which would produce the result claimed by the creditor, and harmonizing the statute with numerous pension laws referred to. Instead of presenting a situation where the court sustained a right, or liability, by some so called liberal construction, it is a case where the court followed the words of the statute considered literally but with their true meaning.

2. U. S. vs. Beaver Run Co. 99 F. (2nd) 610. This was a controversy over priority of a mortgage lien upon property as against a government tax lien upon the same property. The government had failed to file the notice of the tax lien as required by the statute, but sought to sustain priority by reason of the fact that the person against whom the lien was asserted had actual knowledge of the lien when he acquired the property.

The decision sustains exactly what we have contended for in this case. The court refused to read into the statute any limitation based upon any equitable doctrine of *bona fide* purchasers without notice. On page 612 of the opinion the court said: "Whether a statute creating a lien is to be given a liberal or strict construction, it is well established 'that the correct operation and extent of the lien must be ascertained from the terms of the statute which creates and defines it, and the lien will extend only to persons and conditions provided for by statute, and then only where there has been at least a substantial compliance with all of the statutory requirements.'"

The quotation from the opinion, therefore, found on pages 9 and 10 of the respondent's brief, is significant only to the contrary of what is asserted. The following words found in the opinion immediately after the quotation in the respondent's brief are significant:

> "In the instant case, however, literal interpretation of section 3186 does not contain hidden ambiguities, does not defeat the object intended by Congress, and does not result in any shocking absurdity."

3. Boston Sand & Gravel Co. vs. U. S., 278 U. S. 641. This was an admiralty case and the controversy was whether or not the statute authorized the recovery of interest when damages were awarded against the government. The statute itself was silent on the subject. The court found that many provisions of law on that subject must have been in the mind of Congress when it enacted the statute in question, and inasmuch as the statute did not by express terms include interest, it must have been the intention of Congress not to provide for it. Under the circumstances so clearly pointed out in the opinion, it would seem that no other conclusion could be arrived at except by reading into the statute what manifestly was not intended to be put therein.

4. U. S. vs. Lewis, 192 Fed. Rep. 639. We can find nothing in this case pertinent to any proposition now before the court.

5. Tillinghast vs. Tillinghast, 25 F. (2nd) 531. In this case a husband had obtained a final decree of annulment of his marriage. By statute such a decree

was not effective until the time to appeal had expired. The wife, defendant, against whom the decree had been obtained, remarried before the expiration of the time to appeal. Subsequently her second husband claimed that his marriage was illegal because the divorce had not become operative. The court held that the right to appeal was a right for the benefit of the wife which she could waive if she saw fit to do so. That when she remarried, as permitted to do by the decree, she waived her right to appeal and, therefore, that the second marriage was valid. The relevancy of that decision to any question before the court in this case is not apparent.

6. State vs. Thompson, (Mo.) 5 S. W. (2) 57; 319 Mo. 492. This case is one which we should have cited in our own brief had we known of its existence. The case is one of mandamus to compel a state auditor to issue a warrant for expenses incurred by the relator in connection with the performance of his duties as secretary of a statutory commission. The auditor claimed that by the terms of the statute creating the commission its existence had expired. The relator claimed that it was permanent. The rule of statutory construction was declared as follows (quoting from a leading text writer):

> "'A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its

meaning beyond the statute itself'." (Many authorities cited.)

The court then quoted another text writer as follows:

> " 'If the words (of the statute) are free from ambiguity and doubt and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation. The statute itself furnishes the best means of its own exposition; and if the sense in which words were intended to be used can be clearly ascertained from its parts and provisions, the intention thus indicated will prevail without resorting to other means of aiding in the construction.* * * '
>
> Relator is not seeking a construction of the act, but insists that we amend it by adding 'and until their successors are appointed and qualified'. This we are without authority to do."

On this subject of statutory interpretation since the petitioner's brief was printed, there has been published a decision of the New York Court of Appeals which should be called to the attention of this court. The question involved was compensation of a justice of the peace for services rendered for holding criminal court as magistrate. The right depended entirely upon the interpretation of the various statutes on the subject which are set forth, so far as necessary, in the opinion itself. The court said:

> "We are asked to go back of the wording of the statute" (Town law, sec 27, subdivision 2, quoted on page 339 of the opinion) "to various legislative documents to enlighten ourselves as to the

intent of the legislature in enacting that provision. We think such a course is not permissible under the circumstances of this case. We are bound, of course, in interpreting a statute to construe it in view of other statutes relating to the same subject matter, in accordance with the sense of its terms and the intent of the framers of the law. However, 'that intention is first to be sought from the words employed, and if the language is unambiguous, the words plain and clear, conveying a distinct idea, there is no occasion to resort to other means of interpretation.' (Settle vs. Van Evrea, 49 N. Y. 280, 281.)"

Town of Putnam Valley vs. Slutzky, 283 N. Y. 334, 343.

7. Commonwealth vs. Barney, 115 Ky. 475. This case had to do with a Kentucky Criminal statute enlarging the common law liability for fraud and providing a penalty. The question was whether the title of the act under the Kentucky constitution should be read in as a part of the enactment. In his quotation from the case the respondent's attorney inadvertently omitted one sentence which would be the second sentence in his quotation. The opinion (the missing sentence being supplied, italics ours), reads as follows:

"Even as read in entire harmony with its title, the terms of this statute are very general, and, if liberally construed and literally applied, would be most comprehensive and far reaching. *It is true that which is plain needs no interpretation.* At first reading this statute may appear plain enough etc."

POINT IV.

Answering Points III and IV of respondent's brief.

Even if the Miller Act should be held to be liberal in its nature, no rule of construction justifies the inclusion within its benefits of persons not specifically named or referred to therein, and even in cases where liberal construction can be allowed the language of the statute itself must be followed where it is clear, definite and not at all obscure or ambiguous. That is well illustrated in many of the cases cited by the respondent.

1. In Lockhart vs. Hoffman, 197 N. Y. 331, the statute there construed was a part of the labor law of the State of New York which required all hoists used in construction of buildings to be erected inside of the buildings and not outside. An attempt was made to apply that statute where a hoist was used outside of the building which was being repaired. The court refused to accept the liberal construction asked for because the statute did not so provide, saying that remedial statutes should be liberally construed only "when it is possible to do so without doing violence to the language." See page 535 of the opinion.

2. Thompkin vs. Hunter, 149 N. Y. 117, was a case under the New York State General Assignment Law quoted in the opinion at page 120. The statute forbade an assignor to prefer more than a certain percentage of his creditors when he made a general assignment. The case cited held that where the assignor while insolvent and shortly prior to his assignment

transferred all of his property to one creditor, that he did not violate the provisions of the statute against preference because the transfer was separate and distinct and apart from the assignment, refusing to liberalize the statute by such a construction as would include the transaction in question.

3. Baxter vs. McGee, 82 F. (2nd) 695. This case simply interprets a statute declared to be "apparently ambiguous" and what was stated in the opinion had reference to ambiguous statutes.

4. People *ex rel.* Wood vs. Lacombe, 99 N. Y. 43. This case is authority merely for the proposition that a reasonable construction going outside of the words of the statute should be adopted only in cases where there is doubt or uncertainty in regard to the intention of the law makers. See page 49 of the opinion.

5. State vs. Baldwin, 62 Minn. 518, cited on page 13 of the respondent's brief, refuses on any theory of liberal construction to read into a tax law authority to charge interest against delinquent taxpayers.

None of the other cases cited by the respondent hold anything different from the above. None of them are cases where any statute was construed for the benefit of any person not named therein, as would have to be done in this case, if the benefit of the statute should be extended by implication to include laborers and materialmen having no contractual relation with the contractor and who have not exactly complied with the statute on the subject of notice.

POINT V.

The alleged notice which forms the foundation of the respondent's action in order to be effective confessedly needs very liberal construction (R. 30 and 31). See Point VII of petitioner's brief pages 43-45 and pages 17-19 of respondent's brief.

In all cases of liberal construction of documents or statutes the intent behind it must be such as to justify the liberality of construction prayed for in order to accomplish it.

An inspection of this document shows plainly two things.

1. The author of it had no thought when he wrote it that it constituted notice to the contractor, Fleisher Engineering & Construction Company, nor any intention that it should do so.

2. It is equally clear that when Fleisher Engineering & Construction Company received a carbon copy of it, no thought could have been conveyed that such was the effect of it. Both of these propositions are apparent from an inspection of the document itself. It needs no other argument.

It is, therefore, respectfully submitted that the judgment of the courts below should be reversed and that the defendant's (petitioner's) motion for summary judgment dismissing the complaint should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 15.

FLEISHER ENGINEERING & CONSTRUCTION CO. and JOSEPH A. BASS, doing business as JOSEPH A. BASS CO., *et al.*,
Appellants-Defendants in Court Below,
Petitioners,

VS.

UNITED STATES OF AMERICA for the use and benefit of GEORGE S. HALLENBECK, doing business under the assumed name and style of HALLENBECK INSPECTION AND TESTING LABORATORY,
Plaintiff-Appellee in Court Below,
Respondent.

BRIEF ON BEHALF OF RESPONDENT IN CERTIORARI GRANTED ON REHEARING APRIL 22, 1940 (309 U. S. VII. 84 L. E. 738) TO REVIEW DECISION OF UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT. (R. 73.)

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To be Argued by
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Opinions Delivered in Courts Below.

1. Opinion of Hon. Augustus N. Hand in United States Circuit Court of Appeals, concurred in

by Learned Hand and Swan, J. J. (R. 65-71). Published, 107F (2nd) 925.

2. Opinion of Hon. John Knight, D. J. in trial court. (R. 34), Published 30 F. Supp. 964.
3. Opinion of Hon. John Knight, rendered in U. S. District Court, Western District of New York, in companion case (R. 35-40), 30 F. Supp. 961.

Statement of the Case.

The statement of the case contained in the Brief of the petitioner is correct but respondent deems it necessary to add thereto the following statements:

1. The judgment to be reviewed herein is in the sum of $1130.53 with interest and costs. (R. 165.)

2. The Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., were joint contractors (R. 117) under a contract with the United States government for the construction of the Kenfield Housing Project at Buffalo, N. Y., and had one office devoted to the work involved in the carrying out of the performance of their contract. The notice sent by the respondent was contained in an envelope addressed to the Fleisher Engineering & Construction Co. at the said office on the site of the construction project. (R. 130.)

3. The notice was actually received by the said Fleisher Engineering & Construction Co. within the time limit specified in the Miller Act. (R. 113.)

Abstract.

Respondent agrees with the petitioner that the only question presented here is a question of law.

The only question for consideration is whether, in view of the provisions of section 270b, subdivision (a) of the Miller Act, George S. Hallenbeck gave sufficient notice to the contractors, Fleisher Engineering & Construction Co. and Joseph A. Bass, doing business as Joseph A. Bass Co., to enable him to bring suit on the payment bond furnished by the defendants' surety companies.

That presents a question of law only.

The Miller Act, so far as pertinent, reads as follows:

> "Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect to which a payment bond is furnished * * * and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or balance thereof, unpaid at the time of institution of such suit and to prosecute such action to final execution and judgment for the sum or sums justly due him; provided, however, that any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the

last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done and performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office, or conducts his business, or his residence, or in any manner in which the United States Marshal of the District in which the public improvement is situated is authorized by law to serve summons."

Act of August 24, 1935, Chapter 642, sec. 2, 49 Stat. 794; 40 U. S. C. A. 270b.

This so-called Miller Act is the successor to the Heard Act, so-called. The Heard Act, so far as pertinent, reads as follows:

"Sec. 270. BONDS OF CONTRACTORS FOR PUBLIC BUILDINGS OR WORKS: RIGHTS OF PERSONS FURNISHING LABOR AND MATERIALS. Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the

United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. * * * If no suit should be brought by the United States within six months from the completion and final settlement of said contract then the person or persons supplying the contractor with labor and materials shall, * * * be, and are hereby, authorized to bring suit in the name of the United States in the district court of the United States in the district in which said contract was to be performed and executed * * * for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, That where suit is instituted by any of such creditors on the bond of the contractor, it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: And provided further, That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. * * * Provided, Further, that in all suits instituted under the provisions of this section such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor."

Act of February 24, 1905, Chapter 778 as amended by the Act of March 3, 1911, Chapter 231, Sec. 291, 40 U. S. C. A. 270.

The appellants have not raised any question as to the notice containing the information required by the Miller Act. They do, however, raise a question that the notice was addressed to the government project engineer and not to the contractor. They concede, however, that a copy of this notice was served on the general contractor, Fleisher Engineering & Construction Co. by mailing the same in regular mail, postage prepaid, in an envelope addressed to the contractor at the place that the said Fleisher Engineering & Construction Co. and its co-contractor Joseph A. Bass, doing business as Joseph A. Bass Co., maintained their office for the purpose of handling the transactions in connection with the performance of the said contract with the government and was *actually* received by the said contractor, Fleisher Engineering & Construction Co. It is, therefore, the contention of the respondent that he gave sufficient notice to the contractors to enable him to bring suit on the payment bond.

BRIEF OF ARGUMENT.

POINT I.

Before we proceed with our argument, we wish to call the Court's attention to the reasons we believe existed for the enactment of the Miller Act.

Under the Heard Act, a claimant, such as the respondent herein, could not bring an action under the bond provided in the Heard Act until at least six months after the completion of the entire contract by the general contractors. We assume that the Court will recognize the fact that some projects were of such

magnitude that years would be required for their completion. Consequently, situations would arise where someone who had either performed labor, or furnished material, or both, at the very start of the project, would be unable to collect his just payments for this labor and/or material until a long, long time after the performance of his work or the furnishing of his material. It could well be that this delay in payment would be the deciding factor that would cause the claimant to be obliged to give up his business.

It is, therefore, assumed that Congress—having in mind that everyone who furnished material and/or labor on a governmental project should be paid in full—decided to enact legislation that would make it possible for the claimant to recover the amount due in a more expeditious fashion.

It is also assumed that Congress believed that it would be only fair that the general contractor should receive notice of the existence of an unpaid obligation from one or more of his sub-contractors within a reasonable time after the bill was due and owing so that he, in turn, could protect himself if he wished by withholding said sums from any moneys that might be due the debtor-contractor.

It is submitted that Congress never intended to take away from the materialman or laborer any of the benefits existing under the Heard Act without also enacting at least all of those benefits into new legislation, and additional benefits for the said materialman and laborer.

POINT II.

Every statute must be analyzed and its express meaning ascertained.

It is impossible to determine whether a statute has more than one meaning, or any meaning at all, without reading the language and seeking to understand. Then, and only then, is it possible to discover the meaning of the statute and to determine whether the statute is ambiguous and in accord with the general rule, subject to construction. But when the meaning of a statute has been ascertained, is it not logical to state that interpretation already has been accomplished? This rule was enunciated by the late Judge Cardozo when he was Chief Judge of the Court of Appeals of the State of New York, in the case of

Surace et al. v. Danna, et al., 248 N. Y. 18

wherein he stated:

> "* * * Few words are so plain that the context or the occasion is without capacity to enlarge or narrow their extension. The thought behind the phrase proclaims itself misread when the outcome of the reading is injustice or absurdity. *Smith vs. People*, 47 N. Y. 330, 341, 342; Matter of *Meyer*, 209 N. Y. 386, 389, 103 N. E. 713, 714, L. R. A. 1915C, 615, Ann. Cas. 1915A, 263. * * *"

In this connection, these comments by Dwarris in his treatise

Dwarris (Potter)—Statutes 49, 50

are particularly pertinent and enlightening:

> "All new laws, though penned with the greatest of technical skill and passed upon the fullest and most mature deliberation, are considered as more or less obscure and equivocal until their mean-

ing be fixed and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of the objects and the imperfections of human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment; the use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriated to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many, equivocally denoting different ideas * * * And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined."

"No human wisdom can prepare a law in such a form, and in such simplicity of language as that it shall meet every possible complex case that may afterward arise. Whatever skill and forethought the most profound of human law-maker may have called to his aid, it will be found that even such law-giver, though he possess the highest of intellectual gifts will not possess grasp of mind enough to draw up * * * an enactment so perfect at the time it is drawn, that no doubtful case shall not afterwards arise as to its meaning. And as time wears on, and the wants and habits of society become changed, as they ever will change with the progressive march of intelligence * * * the interpretations, suitable to a past age, will become more and more impracticable to the present, as to all new questions."

As was stated in

U. S. v. Beaver Run Co., 99 Fed. (2) 610, 613:

"It is a well established doctrine that a clear, unambiguous statute must be literally construed. If an apparently unambiguous statute contains hidden ambiguities, or if a literal construction would clearly defeat the object intended by con-

gress, or if a literal construction would result in absurdities so gross 'as to shock the general moral sense.' then the courts may be entitled to depart from the strict wording in order to give the statute a reasonable construction."

Other cases apparently go so far as to actually construe statutes which are plain and unambiguous:

"It is said that when the meaning of language is plain, we are not to resort to evidence to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists. If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute."

Boston Sand & Gravel Co. vs. United States, 278, U. S. 41, 73 L. Ed. 170, 49 S. Ct. 52, aff. 19 Fed. (2) 744, which modified 7 Fed. (2) 278 and 16 Fed. (2) 643, aff. 23 Fed. (2) 839. The above quotation is from the opinion of Mr. Justice Holmes.

"The act of June 30, 1879, 21 Stat. 43, providing for the selection of jurors, grand and petit, in the courts of the United States, made a great change in the law then in force. While the language of the act is clear and free from ambiguity, and for this reason there is nothing to construe, still, to carry out the true meaning and intent of the Congress which enacted it and to understand what that intent was, it is proper to ascertain the mischief supposed to prevail at that time, and which it was sought to remedy by the enactment of that statute."

United States vs. Lewis, 192 Fed. 639.

"Unambiguous words call for no construction, but when unambiguous words are used in such a manner as to produce ambiguous or uncertain results, or to produce a manifest injustice or ab-

surdity, not within the reasonable contemplation of the legislature, then it is the duty of the court, in applying the law, to give it such application as is reasonable within the intent of the law."

Tillinghast vs. Tillinghast, 25 Fed. (2) 531, 533.

Also see *State vs. Thompson* (Mo.), 5 S. W. (2) 57.

As was stated in—

Commonwealth vs. Barney (115 Ky. 475, 74 S. W. 181).

"Even as read in entire harmony with its title, the terms of this statute are very general, and, if liberally construed and literally applied, would be most comprehensive and far-reaching. At first reading this statute may appear plain enough. But it must be studied, because practically it must be applied in connection with other statutes of this state. All criminal laws are necessarily enacted to remedy some evil existing or anticipated. Such was the situation which the legislature had in mind, that it must be deemed to have taken a comprehensive survey not alone of the hurtful thing to be corrected, but of the laws already in force tending to, but which had not fully served that end. The fraudulent conversion or disposal of the property of another without his consent goes over a wide range of criminal and civil law."

POINT III.

The Miller Act is remedial in its nature and should receive a liberal construction.

As was said by *Crawford* in his work on "Statutory Construction and Interpretation of Laws", at Page 494:

"To understand the reason for giving remedial statutes a liberal construction, it is necessary that we know what statutes fall within this category. For our discussion here, it will be sufficient to define a remedial statute as one which remedies a defect in the common law or in the pre-existing body of statute law. Such statutes play an important part in the jurisprudence of an advancing society. They supply the defects and abridge the superfluities in pre-existing law, which arise from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of judges, and from any other cause. They serve to keep our system of jurisprudence up-to-date and in harmony with new ideas or conceptions of what constitute justice and proper human conduct. Their legitimate purpose is to advance human rights and relationships. Unless they do this, they are not entitled to be known as remedial legislation nor to be liberally construed. Manifestly, a construction which promotes improvement in the administration of justice and the eradication of defects in our system of jurisprudence, should be favored over one which perpetuates wrong. It seems proper to assume that the lawmakers intended to advance our laws forward as far as our conceptions of justice and proper conduct extend. For this reason, if no other, remedial legislation is entitled to a liberal construction."

"Remedial statutes,

Colorado Milling, etc., Co., vs. Mitchell, 26 Colo. 284, 58 Pac. 28 (employer's liability act);

Harrison vs. Monmouth Nat. Bank, 207 Ill. 630, 69 N. E. 871 (action on negotiable instruments):

that is, those which supply defects, and abridge superfluities, in the former law—

1 Blackstone, Comm. 86,

Also note

Barkley vs. Conklin (Tex.) 101 S. W. (2) 405.

Falls vs. Key (Tex.) 278, S. W. 893.

should be given a liberal construction

Lockhart vs. Hoffman, 197 N. Y. 331, 90 N. E. 943;

State vs. Baldwin, 62 Minn. 518, 65 N. W. 80

in order to effectuate the purpose of the legislature,

Tompkins vs. Hunter, 149 N. Y. 117, 43 N. E. 532;

Shea vs. Peters, 230 Mass. 197, 119 N. E. 746;

or to advance the remedy intended,

State vs. Lipkin, 169 N. C. 265, 84 S. E. 340;

Wright vs. Barber, 270 Pa. 186, 113 Atl. 200;

or to accomplish the object sought,

Amos vs. Conkling, 99 Fla. 206, 126 So. 283;

Inabinet vs. Royal Exchange Assur. Co. (S. C.) 162 S. E. 599;

and all matters fairly within the scope of such a statute should be included, even though outside the letter, if within its spirit or reason.

Traudt vs. Hagerman, 27 Ind. Ap. 150, 60 N. E. 1011;

Harbeck vs. Pupin, 123 N. Y. 115, 25 N. E. 311."

POINT IV.

Under a liberal construction, judgment should be affirmed.

Counsel for the appellants has cited numerous cases but it is submitted that a reading of same does not reveal any that should cause this Court to reverse

the judgment in favor of this respondent. It would seem that the cases cited all refer to statutes or ordinances where the right to a cause of action is *specifically* and *expressly* conditioned upon the performance of some particular act or acts on the part of those seeking to maintain an action under the various statutes.

The cases cited would be in point if the Miller Act had provided that a materialman or laborer would have a right of action upon giving written notice to the contractor, either by registered mail or by service of same by a United States Marshal of the district, or, if the Miller Act had specifically stated that no right of action would exist until a notice, given in either of the last two mentioned manners, had actually been served. It is submitted that the Miller Act does not contain any of the requirements or limitations suggested by the appellants herein.

Congress has provided that the respondent had a cause of action upon giving written notice. Congress did not provide any penalty in the event that the notice was given in some other manner than by registered mail, or by service by a United States Marshal and Congress did not provide that said cause of action would not come into existence if service by registered mail, or by a United States Marshal was not made.

It is very evident, as stated by Justice Hand, in his Opinion of Affirmance of the judgment (page 69 of the Record), that the object of requiring notice to the principal contractor was to enable him to withhold payments from a sub-contractor until the latter should

pay his own men who had worked on the job, and that when, as here, receipt of a written notice is conceded, the mode of transmission becomes unimportant and the provision as to mode of delivery should be regarded as directory and not mandatory.

That construction should be accepted which will make the statute effective and productive of the most good, as it is presumed that these results were intended by the legislature.

Duke Power Co. vs. South Carolina Tax. Comm. (C. C. A.—S. C.) 81 Fed. (2) 513;

State vs. Canadian Pac. R. Co., 100 Me. 202, 60 Atl. 901;

In order to carry out the legislative intent, it is, therefore, apparent that the statute should be given a rational, logical and sensible interpretation.

Baxter vs. McGee (C. C. A.—Ark.) 82 Fed. (2) 695;

People ex rel. Wood vs. Lacombe, 99 N. Y. 43, 1 N. E. 599.

Any construction should be avoided, if possible, as contrary to the intent of the law-makers, that produces any effect at a variance with the commonly recognized concepts of what is right, just and ethical.

International Railway Company vs. United States, 238 Fed. 317, 321

reveals the applicability of the principle herein discussed:

> "There are fewer surer tests in statutory construction than to observe whether the interpretation contended for exposes the statute itself to ridicule; and to find in this act a requirement that all the numerous trolleys daily operating singly from one village to another, and crossing state lines in so doing, must carry useless automatic

> couplers, is absurdity itself, and the argument must go to this extent."

In other words, if the language of the statute, construed as a whole and with due regard to its nature and object, reveals that the legislature intended the words "shall" and "must" to be directory, they should be given that meaning.

U. S. vs. Boyd, 24 Fed. 692;
Manufacturers' Exhibition Building Co. vs. Landay, 219 Ill. 168, 76 N. E. 146;
Pleasant Grove Union School Dist. vs. Algeo, 61 Calif. Ap. 660, 215 Pac. 726;
People vs. Bailey, 171 N. Y. S. 394, 103 Misc. 366.

Words which ordinarily are mandatory in their nature, will be construed as directory or vice versa, if for any reason it appears that it was not the intention of the legislature to make them mandatory.

Kansas Pac. R. Co. vs. Reynolds, 8 Kan. 623;
State vs. Talty, 166 Mo. 529, 66 S. W. 361;
Fields vs. U. S., 27 App. D. C. 433;
Boyer vs. Onion, 108 Ill. Ap. 612.

The Court's attention is respectfully directed to the Opinion of Judge Hand, affixed to the Record, wherein, at pages 70 and 71, he states as follows:

> "Appellants' contention that notice to Fleisher Engineering & Construction Co. alone, even though sufficient in respect to manner and form, did not bind Joseph A. Bass, a joint contractor, is clearly without merit. Notice to one of two (fol. 73) joint obligors or contractors has from ancient times been held to convey notice to the other in respect to matters affecting the joint adventure or obliga-

tion. Tevis v. Ryan, 233 U. S. 273, 287; Northern Ill. Coal Co. v. Cryder, 361 Ill. 274; Knight v. Fifield, 7 Cush. 263; Morse v. Aldrich, 1 Met. 544; Terry & Lowe v. Reding, Moore 555."

The appellants have raised numerous questions of law of a highly technical character, none of them in the least affecting the merits of the controversy. We repeat that the notice did comply with the statute as to its contents. Although it did contain the name of the project engineer as a heading, it also bore the name of the contractor, Fleisher Engineering & Construction Co. on the bottom and this certainly was, under these circumstances, notice, within the proper interpretation of the Miller Act, to the general contractor. There is no requirement in the statute that a demand should be made upon the contractor. All he was entitled to receive was written notice of an outstanding unpaid claim.

Judge Knight, in his Opinion (R. 36) was correct when he referred to the letter as being directed to the Fleisher Engineering & Construction Co., because the placing of the words "CC: Fleisher Engr. & Constr. Co." is a direction of that letter to them and they *actually* received it. A reading of the letter shows that it was the position of the respondent that the defendant, Maryland Casualty Company had knowledge of the unpaid account and had even taken it up with the home office. (R. 153.)

We find ourselves squarely within the position taken by this Court in the case of—

Illinois Surety Co. vs. Jno. Davis Co., 244 U. S. 376, 380, 37 Sup. Ct. 614, 616 (61 L. Ed. 1206)

at which time the Court stated:

> "The statute in question and the proceedings under it are such as to offer great opportunity for such objections, which, if favorably regarded, might often be invoked to defeat substantial justice. In order to prevent this, the Supreme Court has recognized the necessity of a broad and liberal construction of the Act.
>
> Decisions of this Court have made it clear that the statute and bonds given under it, must be construed liberally, in order to effectuate the purpose of Congress as declared in the Act. In every case which has come before this court, where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed, if the suit was brought within the period prescribed by the Act. Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this statute.
>
> And, as was cited in the matter of—
>
> *United States vs. James Mills & Sons Co.*, 55 Fed. 2d Series 249
>
> 'The auditor found that no notice was given, nor publication made as required by the statute. The defendants contend that, as the statute has not been complied with, there can be no recovery. The argument as to the lack of publication would be a compelling one were it not for the case of United States v. N. Y. Steam Fitting Company, 235 U. S. 327, 35 S. Ct. 108, 59 L. Ed. 253, where the Supreme Court, exercising its fatherly care over badly drawn acts of congress, has decided that the provision for publication is merely directory, Fleischmann v. United States, *supra*'."

It is respectfully submitted that the decision of the United States Circuit Court of Appeals for the Sixth Circuit in the matter of the United States of America for the use and benefit of John A. Denie's Sons Co. vs. Joseph A. Bass, *et al.*, is not contrary to and in con-

flict with the decision of the United States Circuit Court of Appeals for the Second Circuit in this case now being presented to the Court.

It was the opinion of the Circuit Court of Appeals for the Second Circuit that a person in Hallenbeck's situation had a cause of action upon giving written notice to the contractor. In the John A. Denie's Sons Co.'s case, the question that was presented was whether actual notice was sufficient to eliminate the requirement for written notice. It is the contention of the respondent here that the Circuit Court for the Second Circuit has not passed on the same question that was before the court in the Denie's Sons Co.'s case.

POINT V.

The judgments of the Circuit Court of Appeals and of the District Court should be affirmed with costs.

Respectfully submitted,

EDWIN J. CULLIGAN,
ALICE B. MARION,
Attorneys for Respondent,
Office & P. O. Address,
928 Liberty Bank Bldg.,
Buffalo, New York.

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 726 15

FLEISHER ENGINEERING & CONSTRUCTION CO., AND JOSEPH A. BASS, DOING BUSINESS AS JOSEPH A. BASS CO., ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF GEORGE S. HALLENBECK, DOING BUSINESS UNDER THE ASSUMED NAME AND STYLE OF HALLENBECK INSPECTION AND TESTING LABORATORY.

PETITION AND NOTICE OF APPLICATION FOR RE-HEARING ON CERTIORARI

FRANK GIBBONS,
Counsel for Petitioners.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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SUBJECT INDEX.

STATUTE CITED.

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 726

NOTICE OF MOTION FOR RE-HEARING

FLEISHER ENGINEERING & CONSTRUCTION CO., AND JOSEPH A. BASS, DOING BUSINESS AS JOSEPH A. BASS CO., ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF GEORGE S. HALLENBECK, DOING BUSINESS UNDER THE ASSUMED NAME AND STYLE OF HALLENBECK INSPECTION AND TESTING LABORATORY,

Plaintiff-Respondent.

To the Above Named Respondent and to Edwin J. Culligan, Esq., Counsel for Respondent:

YOU WILL PLEASE TAKE NOTICE that the attached motion will be presented to the Supreme Court of the United States, at the Court Room of the said Court, in the City of Washington, D. C., on the 22nd day of April, 1940, for hearing and determination.

Dated Buffalo, N. Y. April 16, 1940.

FRANK GIBBONS,
Counsel for the Petitioners.

RECEIVED copy of the foregoing notice and motion this 16th day of April, 1940, hereby admitted to be timely.

EDWIN J. CULLIGAN,
Counsel for the Respondent.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 726

PETITION FOR RE-HEARING OF APPLICATION FOR CERTIORARI

FLEISHER ENGINEERING & CONSTRUCTION CO. AND JOSEPH A. BASS, DOING BUSINESS AS JOSEPH A. BASS CO., ROYAL INDEMNITY COMPANY, AND MARYLAND CASUALTY COMPANY, DEFENDANTS-APPELLANTS IN COURT BELOW,

Petitioners,

vs.

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF GEORGE S. HALLENBECK, DOING BUSINESS UNDER THE ASSUMED NAME AND STYLE OF HALLENBECK INSPECTION AND TESTING LABORATORY, APPELLEE IN COURT BELOW,

Plaintiff-Respondent.

To the Honorable Chief Justice of the United States and the Honorable Associate Justices of the United States Supreme Court:

Fleisher Engineering & Construction Co., Joseph A. Bass, doing business as Joseph A. Bass Co., Royal Indemnity Company, and Maryland Casualty Company, respectfully show:

That heretofore and on the 14th day of February, 1940, your petitioners filed in the office of the Clerk of the United

States Supreme Court their petition and brief praying for a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Second Circuit rendered in the above entitled cause on the 12th day of December, 1939, which construed the provisions of the so called Miller Act of August 24, 1935, 40 U. S. C. A. Section 270 b, to the effect that written notice sent to the contractor by ordinary mail and not by registered mail was a compliance with the statute, it being proven that the document was actually received by the addressee.

Your petitioners respectfully refer to their aforesaid petition and brief and incorporate the same herein as if set out in full.

Since that time, to wit on March 12, 1940, a decision has been rendered by the United States Circuit Court of Appeals for the Sixth Circuit in an action wherein United States of America for the use and benefit of John A. Denie's Sons Co. were appellants, and Joseph A. Bass, etc. *et al.*, were appellees, which is exactly contrary to and in conflict with the aforesaid decision of the United States Circuit Court of Appeals for the Second Circuit. A true and correct copy of the decision so rendered by the Sixth Circuit Court of Appeals is hereto annexed and marked Exhibit C.

Your petitioners further show that they have been informed by the counsel for the successful party in said action and they verily believe that no opinion was written by any member of the United States Circuit Court of Appeals for the Sixth Circuit at the time of the rendition of the said decision, excepting only the memorandum thereof contained in the decision itself, and that the said decision has not yet been pubilshed in the Federal Reporter or in any other report so far as your petitioners know or can ascertain.

Your petitioners further show that the aforesaid decision of the United States Circuit Court of Appeals for the Sixth Circuit was not brought to the attention of this Honorable Court at the time its aforesaid petition was presented for the reason that the same had not then been rendered; that your petitioners became informed of the existence of the action in which said decision was rendered and of the decision made therein on the 25th day of March, 1940; that at once copy of the same was mailed to the clerk of this court with a further petition praying that the same might receive the attention of this court upon the hearing under their aforesaid petition, but that about one hour after the same had been mailed a telegram was received by your petitioners' counsel announcing the decision of this court denying your petitioners' application for certiorari.

Your petitioners further show that it is their belief that if this Honorable Court had been informed of the said decision of the United States Circuit Court of Appeals for the Sixth Circuit that a case would have been presented, whereby it would have been found that the decision of the of the United States Circuit Court of Appeals for the Second Circuit sought to be reviewed would be in conflict with the decision of another Circuit Court of Appeals, to wit the United States Circuit Court of Appeals for the Sixth Circuit on the same matter within the meaning of the provisions of Rule 38-5 (b), and would have furnished a good reason for the exercise of the discretion of this court in your petitioners' favor upon such application.

Your petitioners, therefore, respectfully pray that an order may be made revoking the order heretofore made by this court on the 25th day of March, 1940, denying your petitioners' application for a writ of certiorari and directing that the same be reheard upon their aforesaid petition and this petition which may be treated as a supplementation thereof.

That hereto annexed and marked Exhibit D is a stipulation setting forth the portions of the record so far as pertinent hereto upon which the aforesaid decision of the Sixth Circuit Court of Appeals was rendered.

FLEISHER ENGINEERING & CONSTRUCTION CO.
JOSEPH A. BASS
ROYAL INDEMNITY COMPANY
MARYLAND CASUALTY COMPANY
By FRANK GIBBONS
Their Counsel

FRANK GIBBONS
Counsel for Petitioners.

STATE OF NEW YORK,
COUNTY OF ERIE,
CITY OF BUFFALO. } ss.:

FRANK GIBBONS, being duly sworn, says that he resides in the City of Buffalo, N. Y. and is counsel for the petitioners named in the foregoing petition; that he has read the said petition and knows the contents thereof, and that the statement of facts therein set forth are true to the knowledge of deponent.

FRANK GIBBONS

Subscribed and sworn to before me this 16th day of April, 1940.

GERTRUDE B. TOWNSEND,
(SEAL) *Notary Public, Erie Co. N. Y.*

I, FRANK GIBBONS, of the City of Buffalo, County of Erie and State of New York, counsel for the above named petitioners, Fleisher Engineering & Construction Co., Joseph A. Bass, Royal Indemnity Company and Maryland Cas-

ualty Company, do hereby certify that the foregoing petition for a re-hearing of this cause is presented in good faith and not for delay.

Dated Buffalo, N. Y. April 16, 1940.

FRANK GIBBONS
Counsel for the Petitioners.

EXHIBIT C

No. 8196

UNITED STATES CIRCUIT COURT OF APPEALS

SIXTH CIRCUIT

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF JOHN A. DENIE'S SONS CO., *Appellants,* —*v*— JOSEPH A. BASS, ET AL., *Appellee.*	*Order*

Before SIMONS, ALLEN and HAMILTON, *Circuit Judges.*

In a suit in the name of the United States for the use and benefit of a subcontractor against the principal contractor and his sureties upon a bond for public work under the Heard Miller Act (40 U. S. C. A. 270), tried to the court without a jury,

It appearing that the court overruled a claim of the use plaintiff on the ground that not having any contractual relationship express or implied with the principal contractor, he had not given the statutory written notice by registered mail as provided by Section 270b(a), and

It appearing to the court that no challenge is made by the appellant to the findings of fact of the District Judge as unsupported by evidence, and it appearing to us that there was no error in the conclusions of law arrived below, since it is the view of this court that the statutory require-

ment of notice being unequivocal and without ambiguity is a jurisdictional prerequisite governed by *Texas Cement Co. vs. McCord,* 233 U. S. 157, in that the present statute, as that there interpreted, likewise "created a new liability and gives a special remedy for it, and upon well-settled principles the limitation upon such liability becomes a part of the right conferred and compliance with them is made essential to the assertion and benefit of the liability itself," and the court being further of the view that the decision in *A. Bryant Co. vs. New York Steam Fitting Co.,* 235 U. S. 327, does not militate against this conclusion,

IT IS HEREBY ORDERED That the judgment below be and it is hereby affirmed.

APPROVED FOR ENTRY:

(S) CHARLES C. SIMONS
United States Circuit Judge

FILED: March 12, 1940.

EXHIBIT D

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 726

STIPULATION

FLEISHER ENGINEERING & CONSTRUCTION Co. and JOSEPH A. BASS, doing business as Joseph A. Bass Co., ROYAL INDEMNITY COMPANY, and MARYLAND CASUALTY COMPANY, *Defendants-Appellants in Court Below, Petitioners,*

vs.

UNITED STATES OF AMERICA, for the Use and Benefit of GEORGE S. HALLENBECK, doing business under the assumed name and style of Hallenbeck Inspection and Testing Laboratory, *Appellee in Court Below, Plaintiff-Respondent*

IT IS HEREBY STIPULATED that the document hereto annexed and marked Exhibit C is a true and correct copy of the decision and judgment of the United States Circuit Court of Appeals for the Sixth Circuit, filed in the office of the clerk of that court on March 12, 1940, in the action therein pending entitled United States of America, for the

use and benefit of John A. Denie's Sons Co., Appellants, against Joseph A. Bass, *et al.*, Appellees.

IT IS FURTHER STIPULATED that the cause in which the aforesaid judgment was rendered was upon appeal from a judgment rendered by the United States District Court for the Western Division of the Western District of Tennessee, entered October 28, 1938; that the said judgment was rendered after a trial before the Hon. John D. Martin, Judge of the said court, without a jury; that at the conclusion of the said trial the said judge rendered findings of fact and conclusions of law in writing, pursuant to which the said judgment was entered, which findings of fact so far as pertaining to any question before this Honorable Court are as follows:

"8. That the use plaintiff failed to serve any notice by registered mail or in the manner in which a summons may be served by marshal, as provided for by the statute, but the court finds that the said Bass had actual knowledge of the unpaid amount claimed and had said actual knowledge prior to and within ten days subsequent to the death of Sutton.

9. That in addition to the said material hereinabove described and referred to, the said use plaintiff sold, furnished and delivered to H. S. Sutton, a subcontractor of said Bass upon said job certain additional material, all of which was paid for for except material of the reasonable value and agreed price of $1812.99, that of the payments made on account of said materials which have been deducted in arriving at said balance of $1812.99, $1000.00 of such payments was represented by a check sent by said Bass on his own checking account to the said use plaintiff and by it credited on said account, the said payment having been made by the said Bass April 14, 1937, at the request of the said use plaintiff. * * *

13. The use plaintiff reserves exceptions for the failure of the court in failing to allow the book balance of $1812.99 due on the Sutton account and the use plaintiff excepts to the failure of court in refusing to allow a charge back into the account of said Bass the credits of $2513.59, together with all proper interest charges and such exceptions are allowed.

14. And the use plaintiff further excepts to the action of the court in holding that any statutory notice was necessary and in not holding that actual knowledge was sufficient under the facts and circumstances; and the use plaintiff further excepts to the action of the court in failing to hold there was an implied or *quasi* promise on the part of said Bass to pay the amounts due from the sub-contractor at the time of his death and the completion of the work by said Bass."

IT IS FURTHER STIPULATED that upon the trial of the said action oral evidence was given upon the question of notice as follows:

A contract was made between the contractor and one Sutton, a subcontractor, whereby the said Sutton undertook to furnish lathing and plastering, both labor and materials, for the sum of $15,550.00. Before his contract was completed, to wit on March 9th, 1937, he died and other provisions were made for the completion of the contract. At the time of the death of the said Sutton there was a balance owing to the use plaintiff, John A. Denie's Sons Company for labor and materials furnished to Sutton by it to the amount of $2485.64. About a week or ten days after the death of Mr. Sutton, one of the witnesses on behalf of the use plaintiff met the contractor and told him how much the Sutton account amounted to and continued, "We were discussing the plastering contract generally and he stated to me that he would employ Sutton's son to act as foreman and to look after the work, and for us to go ahead and furnish the material and he would see that they were taken care of." On April 6th, 1937, the witness wrote a letter to the contractor dated on that day, which reads as follows:

"April 6, 1937

Jos. A. Bass Co.,
332 Sexton Bldg.,
Minneapolis, Minn.

Dear Mr. Bass:

This is just to remind you of our conversation in your office on Monday of this week at which time you stated you would send us a check on Saturday, April 10th, for your account as represented by statement handed you, showing the status of the account with all

credits allowed as of March 31st, 1937, a balance of $3366.28. And at that time you also stated you would include a separate check for a substantial payment on the Sutton account.

Thanking you kindly for your usual promptness, we are,

Yours very truly,

Secretary-Treasurer."

In reply to that letter of April 6th, 1937, the use plaintiff received from the contractor a letter dated April 14, 1937, which reads as follows:

"April 14, 1937

John A. Denie Sons Co.,
Memphis, Tenn.

Re: U. S. Marine Hospital,
Memphis, Tennessee

Dear Morrie:

In regard to your letter of April 12th, I wish to state that there is quite a difference between your statement and our statement and of course until we check it up we will not be able to state how much the difference is. We have been very busy and have not had time. In the first place there is a considerable amount of empty bags that we have not had the proper credit for and we did not know that you were anxious to receive payment right up to the last dollar. I didn't expect to pay right up to March 31st. You must realize that I have a considerable amount of money that has been held back by the Government—something like $60,000.00 that the Construction Engineer has not been quite fair about allowing the real amount of my estimate. Therefore, I must say that I was just cutting the corners a little bit.

As far as the Sutton account is concerned, I am mailing you a check for $1,000.00 to apply on their account.

Now, if it is necessary for you to have any more money on our account—if you MUST have it—please do not hesitate to write me further and we will endeavor to do something about checking into the account.

As far as promises that I have made to Mr. Bartholomew—all I told him is that I would send him a substantial amount of money. I made no particular reference

to the amount. I am very sorry that he misconstrued my meaning.

Yours very truly,

JOSEPH A. BASS COMPANY
By Jos. A. BASS"

IT IS FURTHER STIPULATED that the aforesaid copy of decision, Exhibit C, may be used by the petitioners upon application for a rehearing of their application for a writ of certiorari in all respects as if duly and properly certified by the clerk of the United States Circuit Court of Appeals for the Sixth Circuit, said certification being hereby waived, and that the facts set forth in this stipulation may be received in all respects in the place and stead of the transcript of record now on file in the said clerk's office duly certified as such, and that the foregoing statement constitutes all of the evidence contained in the said transcript material to any matter upon this application.

Dated, Buffalo, N. Y., April 16, 1940.

FRANK GIBBONS,
Counsel for Petitioners.

EDWIN J. CULLIGAN,
Counsel for Respondent.

SUGGESTIONS IN SUPPORT OF FOREGOING MOTION

From the petition for certiorari referred to in the foregoing petition and filed in the office of the Clerk of the United States Supreme Court on February 14, 1940, and the record of the United States Circuit Court of Appeals, for the Second Circuit, in the above entitled cause, it appears that the decision sought to be reviewed construes the provisions of the so-called Miller Act of August 24, 1935, 40 USCA 270-b on the subject of notice required to be given by one who has no contractual relations with the contractor but who has furnished materials or labor to a subcontractor on government work, so that such a person may recover upon the pay-

ment bond furnished by the contractor, if he shall have given written notice to the contractor by ordinary mail instead of by registered mail, upon proof that the written notice was actually received by the contractor.

The decision of the United States Circuit Court of Appeals for the Sixth Circuit referred to in the foregoing petition, copy of which is attached thereto as Exhibit C, is believed to be contrary to and in conflict with the aforesaid decision of the United States Circuit Court of Appeals for the Second Circuit.

Inasmuch as the decision of the United States Circuit Court of Appeals for the Sixth Circuit was not rendered until March 12, 1940, it was not, and could not have been brought to the attention of the court in the original petition for certiorari filed on February 14, 1940.

The importance of a final determination of the question which shall be uniform throughout the United States is self-evident. All contractors in government work, their sub-contractors and materialmen, as well as their sureties, and the government itself, ought to be able to know the correct rule of law in that respect to enable them to determine by what rules they must be governed.

It is important to all parties above mentioned that the foregoing question be speedily decided to avoid confusion and expense.

Respectfully submitted,

FRANK GIBBONS,
Counsel for the Petitioners.

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Supreme Court of the United States

OCTOBER TERM, 1939

No. [redacted] 15

FLEISHER ENGINEERING & CONSTRUCTION CO., AND JOSEPH A. BASS, DOING BUSINESS AS JOSEPH A. BASS CO., ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF GEORGE S. HALLENBECK, DOING BUSINESS UNDER THE ASSUMED NAME AND STYLE OF HALLENBECK INSPECTION AND TESTING LABORATORY.

BRIEF OF RESPONDENT IN ANSWER TO PETITION FOR REHEARING ON CERTIORARI.

EDWIN J. CULLIGAN,
ALICE B. MARION,
Attorneys for Respondent,
928 Liberty Bank Bldg.,
Buffalo, N. Y.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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SUBJECT INDEX.

STATUTE CITED.

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 726

FLEISHER ENGINEERING & CONSTRUCTION CO., AND JOSEPH A. BASS, DOING BUSINESS AS JOSEPH A. BASS CO., ROYAL INDEMNITY COMPANY and MARYLAND CASUALTY COMPANY, Defendants-Appellants in Court Below,

Petitioners,

vs.

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF GEORGE S. HALLENBECK, DOING BUSINESS UNDER THE ASSUMED NAME AND STYLE OF HALLENBECK INSPECTION AND TESTING LABORATORY, Appellee in Court Below,

Plaintiff-Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR REHEARING FOR APPLICATION FOR CERTIORARI.

1. This Court, on March 25, 1940, on a proper review of all the facts and the law, denied petitioner's application for certiorari.

2. The United States Circuit Court of Appeals for the Sixth Circuit, in an action wherein United States of America for the use and benefit of John A. Denie's Sons Co. were appellants, and Joseph A. Bass, etc., *et al.*, were appellees, *did not* render a decision exactly contrary to and in

conflict with the decision rendered in this action by the United States Circuit Court of Appeals for the Second Circuit.

We, respectfully, call the Court's attention to the Opinion of Hon. Augustus N. Hand, Circuit Judge of the Second Circuit, wherein he stated with reference to this, the HALLENBECK action (pages 68 and 69, Fols. 70 and 71), as follows:

> "The only question for consideration is whether in view of the provisions of Section 270b, subdivision (a) of the Miller Act Hallenbeck, called in the briefs 'the use plaintiff', gave sufficient notice to the original contractors to enable him to bring suit on the payment bond.
>
> We feel no doubt that the notice complied with the statute as to its contents. It was not, however, sent by registered but only by ordinary mail and therefore did not conform to the provisions of Section 270b (a) in respect to method of mailing. Furthermore, it was only mailed to Fleisher Engineering & Construction Co. and no separate notice was mailed to Joseph A. Bass. On a motion for summary judgment made by the United States on behalf of Hallenbeck the District Court held that the notice sent to Fleisher Engineering & Construction Co. by ordinary mail satisfied the requirements of the statute and that such a notice to one of the contractors was sufficient to bind the other. We hold that his disposition of the motion was correct and accordingly that the judgment should be affirmed.
>
> It is admitted that the notice was in writing and sent by mail and reached one of the two contractors who had jointly and severally agreed to perform the contract. The statute does not in terms make sending a notice by 'registered mail' a condition of a right of action by or on behalf of one furnishing labor or materials in the prosecution of the work provided for in a public contract and we are confident that Section 270b, subdivision (a) should receive no such interpretation.
>
> It is to be observed that subdivision (a) affords a right of action to a person in Hallenbeck's situation 'upon

> *giving written notice to said contractor* within ninety days from the date on which such person did or performed the last of the labor. * * *' The following sentence provides how the notice is to be served but contains no language making the right of action dependent upon the mode of service. The (fol. 71) object of requiring notice to the principal contractor was doubtless to enable him to withhold payments from a subcontractor until the latter should pay his own men who had worked on the job. The apparent purpose of providing for notice by 'registered mail' was to insure receipt of the notice. But where, as here, receipt of a written notice is conceded, the mode of transmission becomes unimportant and the provisions as to mode of delivery should be regarded as directory and not mandatory." (Italics ours.)

In the action decided by the United States Circuit Court of Appeals for the Sixth Circuit, *the written notice prescribed by the statute was never given,* as appears from Exhibit D on page 9 of the Petition for Rehearing. One of the witnesses, on behalf of the use-plaintiff in the John A. Denie's Sons Co. case, met the contractor and *told him* how much the Sutton account amounted to. There is, under those facts, a definite failure on the part of the use-plaintiff in the John A. Denie's Sons Co. case to comply with that portion of the statute which, in the opinion of Justice Hand, quoted in part above, gives rise to the cause of action under the provisions of Section 270b, subdivision (a) of the Miller Act.

The petition for writ of certiorari should be denied.

Respectfully submitted,

EDWIN J. CULLIGAN,
ALICE B. MARION,
Attorneys for Respondent,
928 Liberty Bank Bldg.,
Buffalo, N. Y.

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SUPREME COURT OF THE UNITED STATES.

No. 15.—October Term, 1940.

Fleisher Engineering & Construction Co., and Joseph A. Bass, doing business as Joseph A. Bass Co., et al., Petitioners,

vs.

United States of America, for the use and benefit of George S. Hallenbeck, etc.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 12, 1940.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The United States brought this suit on behalf of George S. Hallenbeck to recover upon a bond given by Fleisher Engineering & Construction Company and Joseph A. Bass, with their sureties, and providing for the payment for labor and material furnished under a contract between the principals on the bond and the United States for the construction of a certain housing project. Part of the labor required by the contract was performed by Hallenbeck for a subcontractor with the approval of the contractors. The suit was brought under the Miller Act of August 24, 1935, 40 U. S. C. 270b. Plaintiff obtained a summary judgment (30 F. Supp. 964) which the Circuit Court of Appeals affirmed. 107 F. (2d) 925.

The applicable provision of the Miller Act is set forth in the margin.[1] The question is whether the giving of the required written

[1] Section 2 of the Act of August 24, 1935, c. 642, 49 Stat. 794, 40 U. S. C., Sec. 270b, provides:

"(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no con-

notice to the subcontractor was sufficient, as it was not sent by "registered mail". The Circuit Court of Appeals held that as the receipt of written notice was conceded and the contents of the notice were adequate, the statute was satisfied. In view of alleged conflict with the decision in *United States for the use of John A. Denie's Sons Co.* v. *Bass,* 111 F. (2d) 965, we granted certiorari. 309 U. S. 693.

In construing the earlier Act, the Heard Act, for which the Miller Act is a substitute, we observed that it was intended to be highly remedial and should be construed liberally. *United States for the use of Alexander Bryant Co.* v. *New York Steam Fitting Co.,* 235 U. S. 327, 337; *Illinois Surety Co.* v. *John Davis Co.,* 244 U. S. 376, 380; *Fleischmann Construction Co.* v. *United States,* 270 U. S. 349, 360. We recognized that the statute created a new right of action and that compliance with the prescribed limitation was essential to the assertion of the right conferred. Accordingly, as it was provided that a material-man could not bring suit on the contractor's bond in the name of the United States within six months from completion and settlement, the Court held that this provision plainly conditioned the right to sue. *United States ex rel. Texas Portland Cement Co.* v. *McCord,* 233 U. S. 157, 162, 163. That ruling was distinguished in the case of the *Alexander Bryant Company, supra,* where it was held that the provision of the Act requiring notice to be given to other creditors by the creditor availing himself of the right to sue within the specified year, if the Government did not bring suit within six months after completion, was not "of the essence of jurisdiction over the case" or "a condition of the liability" of the surety on the bond. In short, a requirement which is clearly made a condition precedent to the right to sue must be given effect, but in determining whether a provision is of that char-

tractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons".

acter the statute must be liberally construed so as to accomplish its purpose. "Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this statute". *Illinois Surety Co.* v. *John Davis Co., supra.* The same principle should govern the application of the Miller Act.

In the instant case, we may lay on one side the fact that the notice was addressed to the project engineer. As the court below said, it was admitted that the notice was in writing and was sent by mail and that it reached one of the two contractors who had jointly and severally agreed to perform the contract. And at this bar, the actual receipt of the notice and the sufficiency of its statements have not been challenged.

In giving the statute a reasonable construction in order to effect its remedial purpose, we think that a distinction should be drawn between the provision explicitly stating the condition precedent to the right to sue and the provision as to the manner of serving notice. The structure of the statute indicates the distinction. The proviso, which defines the condition precedent to suit, states that the material-man or laborer "shall have a right of action upon the said payment bond upon giving written notice to said contractor" within ninety days from the date of final performance. The condition as thus expressed was fully met. Then the statute goes on to provide for the mode of service of the notice. "Such notice shall be served by mailing the same by registered mail, postage prepaid", or "in any manner" in which the United States marshal "is authorized by law to serve summons". We think that the purpose of this provision as to manner of service was to assure receipt of the notice, not to make the described method mandatory so as to deny right of suit when the required written notice within the specified time had actually been given and received. In the face of such receipt, the reason for a particular mode of service fails. It is not reasonable to suppose that Congress intended to insist upon an idle form. Rather, we think that Congress intended to provide a method which would afford sufficient proof of service when receipt of the required written notice was not shown.

In this view we conclude that the Circuit Court of Appeals correctly disposed of the case and its judgment is affirmed.

Affirmed.